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In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, Secretary of Health, Education and Welfare,

Appellant,

vs.

CORA McRAE, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF INTERVENING DEFENDANTS-APPELLEES JAMES L. BUCKLEY, JESSE A. HELMS, HENRY J. HYDE, AND ISABELLA PERNICONE IN SUPPORT OF APPELLANT HARRIS

A. LAWRENCE WASHBURN, JR.
1414 Avenue of the Americas
New York, NY 10019

GERALD E. BODELL
150 E. 35th Street
New York, NY

VICTOR G. ROSENBLUM
DENNIS J. HORAN
JOHN D. GORBY
CARL ANDERSON
PATRICK A. TRUEMAN
THOMAS J. MARZEN
Americans United for Life
Legal Defense Fund
230 N. Michigan Ave. #515
Chicago, Il 60601
312/263-5386

Attorneys for James L. Buckley, Jesse A. Helms, Henry J. Hyde and Isabella M. Pernicone

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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QUESTIONS PRESENTED

I. Whether the United States Congress, acting under the Appropriation Power granted solely to it under Article I, section 9, clause 7 of the United States Constitution, violated the Fifth Amendment to the Constitution by enacting the Hyde Amendment?

II. Whether Congress acting under the legislative powers granted to it by the United States Constitution may protect its interests, particularly its strong interest in fetal life, by limiting, through enactment of the Hyde Amendment, disbursement of federal funds for abortions?

III. Whether States are required under Title XIX of the Social Security Act to fund all abortions deemed "medically necessary"?

SUMMARY OF THE ARGUMENT

This is not a "right to privacy" case. It is a case about disbursal of public funds in a federal social and economic program. The district court's decision that the United States must fund the exercise of the privacy right is at odds with the nature of American constitutional tradition, in which "rights" denominate the liberties of the individual as against the State, rather than an obligation of the State to assist an individual to reach some end. Whether or not constitutional rights will be implemented by the State is a matter for Congress, not the courts, under our system of government.

The practical effect of the district court's ruling that the government must fund all "medically necessary" abortions is that all legally permissible abortions, including elective abortions, must be funded. This is so because the district court has adopted the very broad definition of medical necessity set forth by this Court in *Doe* v. *Bolton,* 410 U.S. 179, 192 (1973). The testimony of the plaintiffs' physicians in the lower court as well as the lower court's opinion itself reinforces this fact. Dr. Jane Hodgson testified for the plaintiffs that every abortion that is not wanted is "medically necessary." A. at 146. Two other of plaintiffs' physicians testified that whether an abortion is wanted or not is the "key factor" in determining whether the abortion is "medically necessary." Other of plaintiffs' physicians testified that the term "medically necessary" is a preventive medicine standard. Another of plaintiffs' physicians testified that all abortions for adolescents are "medically necessary." The lower court cited numerous instances in which abortion is considered "medically necessary." The court found that fetal abnormality is a "medically necessary" reason for abortion because it presents a threat to family stability. The court even held that "poverty itself . . . is a medically relevant factor" (slip op. at 160), permitting the inference that all abortions performed on indigents may be certified as "medically necessary."

Because of the way in which the lower court used the term "medically necessary," an affirmance of the lower court ruling would have the practical effect of overruling *Beal* v. *Doe,* 432 U.S. 438 (1977), *Maher* v. *Roe,* 432 U.S. 464 (1977), and *Poelker* v. *Doe,* 432 U.S. 519 (1977).

The order of the district court requiring that funds be paid for all "medically necessary" abortions contravenes Article 1, §9, cl. 7 of the United States Constitution which vests in Congress the sole power to appropriate funds. Congressional precedent and the language of the Hyde Amendment itself make clear that Congress has not appropriated funds to pay for abortions except for those limited categories of abortions mentioned in the Hyde Amendment. The lower court was in error believing that funds exist in the general appropriation which may be disbursed for all "medically necessary" abortions once the Hyde Amendment is enjoined.

The judiciary has consistently refused to arrogate unto itself the appropriations power of Congress. *Knote* v. *United States,* 95 U.S. 149 (1877); *Reeside* v. *Walker,* 52 U.S. (11 How.) 623 (1850); *Doe* v. *Mathews,* 420 F. Supp. 865 (D. N.J. 1976).

The question of which abortions the United States Congress would fund is a "political question" and is thus nonjusticiable. The principles of nonjusticiability are set forth in the "political question" cases, *e.g., Baker* v. *Carr,* 369 U.S. 186 (1962). Those principles are applicable here and counsel in favor of deference to congressional judgment.

As this Court has held, there is no obligation on the State to pay any of the medical expenses of indigents. *Maher* v. *Roe,* 432 U.S. at 487. Therefore, there can exist no fundamental right to a governmentally subsidized "medically recommended" abortion. Prior cases decided by this Court which involved state criminal penalties imposed on the right of privacy which included a "medically recommended" abortion no more apply here than they did in

Maher v. *Roe.* Failure to provide funds to implement rights of privacy does not represent direct state interference with the exercise of such rights. Moreover, the physician who recommends an abortion can claim no independent right of his own has been burdened by the Hyde Amendment. *Whalen* v. *Roe,* 429 U.S. 589, 604 n.33 (1977). Since the woman cannot claim that her right of privacy has been burdened through mere state failure to fund her decision to abort, neither may the physician. Whether or not the government funds any abortion is an "economic, social, and even philosophical problem" for the Congress to decide. *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970).

The Hyde Amendment imposes no penalty or condition on an exercise of the woman's right of privacy. It does not withdraw general welfare benefits because of any past act of the woman; it does not condition receipt of general welfare benefits on forfeiture of the woman's right of privacy. The Hyde Amendment simply excludes reimbursement for a certain category of treatment to encourage alternative forms of treatment. *See Geduldig* v. *Aiello,* 417 U.S. 484 (1974). Because a physician believes abortion is medically recommended, he cannot transform the Amendment into what amounts to a fine. The government has no obligation to fund even the most "basic economic needs" in any case. *Dandridge* v. *Williams,* 397 U.S. at 485. Analysis of this Court's prior decisions finding that governmental assistance programs created a penalty on the exercise of a fundamental right demonstrates that the Amendment creates no such penalty.

The existence of the medicaid program does not generate any due process right to federally funded abortions. The medicaid eligible woman has a "property interest" in her *status* as a potential recipient of governmental benefits, but her interest in the government *funds* which may or may not be allocated toward any purpose under the Medicaid Title is merely speculative. *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1972).

The medicaid program is enacted for certain classes and for specific purposes perceived to serve the public interest. The potential recipient cannot properly claim that the existence of the program generates a "right of access" to whatever funds are allocated to its purposes in order to exercise her private rights. Moreover, rights of privacy lose their fundamental character when exercised outside the zone of privacy created for them by the Constitution. Therefore, unlike freedom of speech or the right to travel, the right of privacy which includes abortion can make no demand to access in the pool of federal funds supplied to implement the medicaid program.

The Hyde Amendment does not inhibit free exercise of religion. The Free Exercise Clause does not protect decisions merely because they are conscientiously made under the aegis of religious authority. To fund decisions to abort in order to implement the free exercise of a religiously inspired decision to abort would violate the Establishment Clause. The Hyde Amendment does not discriminate on the basis of religion, and it creates no condition on its exercise.

The "statutory class of adolescents at high risk of pregnancy" as defined by Congress does not constitute a suspect class under the Constitution. Legislatures do not create "suspect classes"; the Constitution does. In any case, the Amendment does not discriminate against the statutory class of adolescents at risk of pregnancy: all women are treated the same by the Amendment.

The Hyde Amendment is rationally related to the valid governmental interest in protection of the fetus. The district court acknowledged that preservation of fetal life was the purpose of the Amendment, but characterized this interest as "insufficient" when it conflicts with the State's interest in maternal health. Since "governmental decisions to spend money . . . in one way and not the other" are not the business of the courts, *Mathews* v. *DeCastro,* 429 U.S. 181, 185 (1976), the district court usurped legislative prerogatives by striking the Amendment. The state's

interest in childbirth and the woman's right to childbearing are of greater constitutional import than the right of privacy which encompasses abortion. In addition to the state's interest in protection of the fetus, the Hyde Amendment serves a valid interest in recognition of the moral precepts of the American people.

The Medicaid Title of the Social Security Act does not preclude States, in their discretion, from declining to fund abortions not necessary to preserve maternal life, particularly when considered in light of the "cooperative federalism" which animates the Social Security Act, and in light of Congress's repeated votes expressing an intent to fund abortion only in very narrow circumstances.

The *Beal* holding that the standard by which the validity of state coverage determinations should be judged is whether they are "reasonable" and "consistent with the objectives of the Act" should be reaffirmed. In contrast to the lower court's ruling that all "medically necessary" items within five mandated categories must be covered, the *Beal* standard is supported by the plain language of the Title, legislative history, and other portions of the Act, as well as the current regulations.

Beal correctly held that the state's legitimate interest in fetal life is not inconsistent with the objectives of the Title. It is reasonable for a State to refrain from funding abortions not necessary to preserve maternal life in view of this interest, the availability of alternative treatments to deal with complications of pregnancy, and the fact that a "medically necessary" standard means that elective abortions will be funded.

Even if the *Beal* standard were overturned, and a "medically necessary" standard substituted, the fact that abortions other than those necessary to save the life of the mother were illegal in most States when the Medicaid Title was passed, together with the national policy repeatedly expressed by Congress to disfavor abortion and abortion funding except when maternal life is endangered, would justify state decisions not to fund.

ARGUMENT

I.

INTRODUCTION

This is not a right to privacy case. It is a case about the appropriation and disbursement of public funds under federal and state medicaid programs. But because it concerns the disbursement of governmental funds for abortion, this case evokes passions on both sides of the abortion controversy raging in the nation for the past decade; it attracts the attention of the media, and captures the interest of the public at large. The subject of abortion rouses deep convictions, even among members of the judiciary, that make impartial resolution of the issues in this case in accord with strict constitutional principles difficult. As this Court recognized in *Roe* v. *Wade,*

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.
>
> In addition, population growth, pollution, poverty and racial overtones tend to complicate and not to simplify the problem.

Roe v. *Wade,* 410 U.S. 113, 116 (1973).

The danger this Court acknowledged in *Roe* is that this case may be treated differently than others because it involves abortion, or that its resolution might be based more on predisposition than on established principles of constitutional law and political theory. But, as in *Roe,* the "task" now facing this Court is "to resolve the issue by

constitutional measurement, free of emotion and predilection." *Roe* v. *Wade,* 410 U.S. at 116.

Although this case touches on the subject of abortion, from a jurisprudential and constitutional perspective this is neither an "abortion case" nor a right to privacy case. This case does not involve any substantive constitutional rights of persons; it involves appropriations made by the Congress for use in an economic and social welfare program.

The constitutional rights (right to privacy and free exercise of religion) which the district court held are infringed by the Hyde Amendment are "non-interference" rights—freedoms or immunities from governmental restraint or interference. Indeed, all of the rights set forth in the Bill of Rights are properly characterized as "non-interference" rights: freedom of speech, expression, and belief; freedom of religion; freedom of assembly and association; freedom to petition the government; freedom from unreasonable searches and seizure; freedom from arbitrary arrest; and freedom from being twice placed in jeopardy. In this regard, the "right to privacy" is not different from those rights explicitly stated in the Bill of Rights —in part because, though not explicitly mentioned in the Bill of Rights, it was discovered in the penumbras of other non-interference rights. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). The purpose of "non-interference" rights is to secure freedom. The obligation of the State with respect to these rights is negative: to refrain from interference. These rights impose no positive obligation whatsoever on the government, except perhaps to create independent courts to protect and to act as guardians of the freedom of the individual as against the various branches of government. This conception of the fundamental right as a freedom from governmental interference accurately reflects the liberal political theories of the 18th and early

19th centuries which were fully incorporated into the U.S. Constitution and its Bill of Rights.

In contrast to the American conception of fundamental rights as freedom from interference by others, particularly the State, are theories of fundamental rights incorporated into many constitutions of this century—constitutions which establish affirmative obligations on the State to provide certain economic and social benefits to its citizens and to intervene on behalf of fundamental rights. For example, an affirmative constitutional obligation to protect rights and freedoms of individuals from infringement by others, not merely to refrain from interfering with them, can be found in the Basic Law of the Federal Republic of Germany, which obligates the State to act to protect rights and freedoms set forth in the German Constitution. This explains the obligation on the German State to enact effective legislation to protect the lives of all individuals. *See, e.g.,* Jonas & Gorby, *West German Abortion Decision: Introduction and Translation of the German Federal Constitutional Court Decision,* 9 J. Mar. J. Prac. & Proc. 557 (1976). Other examples of recent constitutions which obligate the State to act affirmatively are the U.S.S.R. Constitution of 1936, ch. X (Fundamental Rights and Duties of Citizens); the Republic of India, Constitution of 1949, art. 38 of Part IV (Directive Principles of State Policy); Constitution of 1954 of the Peoples Republic of China, ch. III (Fundamental Rights and Duties of Citizens); Constitution of the United Arab Republic of 1964, art. 42 of Part III (Public Rights and Duties); Constitution of Venezuela of 1961, art. 51 of ch. IV (Of Health and Social Welfare). *See generally* Brownlie, *Basic Documents on Human Rights* (1971).

The U.S. Bill of Rights imposes none of these affirmative obligations on the State to act. The U.S. Constitution, a product of another political era and other political theories, is very different from many constitutions of the 20th

century which impose affirmative obligations on the State and which establish certain economic and social programs which the State must pursue.

There is, of course, nothing in the U.S. Constitution which *precludes* the State from taking affirmative steps to establish social and economic programs to "provide for the general welfare of the United States." U.S. Const. art. I, §8, cl. 1. But the Constitution does not require or obligate the State to create such programs. Instead, it explicitly vests the legislative branch of the federal government, the Congress, with the exclusive authority to decide whether, how, and to what extent such programs should be created.

The constitutional amendments are phrased in the rhetoric of this understanding of fundamental rights.[1] Since the fundamental rights themselves do not impose affirmative obligations on the State to act, the Amendments setting forth these rights often vest the *Congress* with the power to enforce them with appropriate legislation in a separate section.[2] Nothing suggests the Congress *must* act. That

[1] For example, Amendment I (1791) provides "Congress shall make no law. . . .": Amendment XIV (1868) provides "no State shall make any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property . . . ; nor deny . . . equal protection of the laws": Amendment XV (1870) provides "The right of citizens to vote shall not be denied . . . by the United States or any State. . . ." *See also* Amendments XIX (1920), XXIV (1964), XXVI (1971). The proposed Equal Rights Amendment provides that "Equality of rights . . . shall not be denied or abridged by the United States or by any State on account of sex."

[2] Amendments XIII (1865), XIV (1868), XV (1870), XIX (1920), XXIII (1961), XXIV (1964), XXVI (1971), as well as the proposed ERA Amendment, each provide that "Congress shall have the power to enforce this article by appropriate legislation." This suggests that any affirmative action taken is left to the Congress, not required by the Constitution itself.

is left to the normal democratic processes. Only in this light is Justice Holmes' "now vindicated dissent in *Lochner* v. *New York*, 198 U.S. 45, 76 (1905)", *Roe* v. *Wade*, 113 U.S. at 117, intelligible:

> [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar or novel or even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

As Justice Cardozo stated in *Helvering* v. *Davis*, 301 U.S. 619, 644 (1937),

> Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the Courts. Our concern here, as often, is with power, not with wisdom.

Clearly, as Mr. Justice Stewart stated in *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1969),

> [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public funds among the myriad of potential recipients.

All of the "right to privacy" cases fall within this pattern and tradition. *See, e.g., Baird* v. *Bellotti*, 99 S.Ct. 3035 (1979); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Planned Parenthood* v. *Danforth*, 423 U.S. 52 (1975); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), all invalidating state statutes because those statutes (all criminal in nature) impinged upon the individual's zone of privacy.

Maher v. *Roe,* 432 U.S. 464 (1977), and *Poelker* v. *Doe,* 432 U.S. 519 (1977), also fall within this pattern and are part of this tradition of American jurisprudence. In both cases this Court investigated the possibility that state actions infringed on a fundamental freedom, concluding that they did not. In both cases this Court rejected the notion that the Constitution imposes an affirmative obligation to act, expressly noting in *Maher* that "the Constitution imposes no obligation on the state . . . to pay any of the medical expenses of indigents," *Maher* v. *Roe,* 432 U.S. at 469, and further noting:

> We emphasize that our decision today does not proscribe government funding of nontherapeutic abortions. It is open to Congress to require provision of Medicaid benefits for such abortions as a condition of state participation in the Medicaid Program. Also, under Title XIX . . . Connecticut is free—through the normal democratic processes—to decide that such benefits should be provided. We hold only that the Constitution does not require a judicially imposed resolution of these difficult issues.

Id. at 480.

The district's court's decision in this case is, however, utterly inconsistent with the established meaning of fundamental rights in American constitutional law. It is premised on the notion that the Constitution imposes upon the government affirmative obligations: 1) to provide funding for health related abortions, 2) to provide funding for abortions when they are regarded as a religious duty, and 3) to prefer its interest in the health of its citizens over its interest in prenatal human life and childbirth. Apparently, the district court believes that, contrary to all precedent, the Constitution does indeed impose far-reaching affirmative obligations on the government to enact welfare programs. Apparently, the district court believes that Justice Holmes was wrong: that the Constitution does indeed impose on American society an obligation to enact Mr. Herbert Spencer's social and economic system (or perhaps more accurately, that of some other social philosopher of the opposite persuasion). Thus, any attempt to distinguish *Maher* on the theory that *Maher* deals with "nontherapeutic" abortions, whereas this case deals with "therapeutic" abortions, will not avoid the much more fundamental issue presented here: whether the Constitution imposes a judicially determined resolution on funding and appropriations issues, or whether the responsibility for promoting the general welfare is vested in the Congress. Acceptance and affirmation of the district court's decision will mark a radical and revolutionary departure from the traditions implicit in the American constitutional system.

The district court fails to understand this division of powers within the federal State which lies at the very heart of the American constitutional order. Indeed, the mammoth 329-page opinion (not including 300 pages of appendix) of the district court testifies to its attitude toward the role of the judiciary. The district court functioned as a "legislative hearing officer," collecting facts of the type the legislature normally considers in deciding what laws to enact, and consigning those facts to the "wisdom" of the judiciary, thus "second-guessing" the Congress. In fact, the first 275 pages of the district court's opinion deal with "legislative facts"—not with the traditional adjudicative facts concerning who did what, when, where, and how, or with legal analysis. Significantly, the district court's findings of fact are findings of "legislative facts"—not adjudicative facts. It draws conclusions about the nature of medicine and abortion, about the efficacy of alternative treatment, about the nature of religious beliefs, about political motivations, and so forth.

Yet the district court is in no better position to make permanent findings about the nature of reality

from the perspective of the science of medicine, or about the principles of a given theological system, than was the State of Tennessee in a position to make findings about the accuracy of Darwin's theories of evolution. Of course, if laws are to be wise, the lawmaker must seek accurate insights. But when such determinations are made by a court under the guise of constitutional interpretation, findings of legislative fact are "etched in stone" and take on the nature of Ultimate Truth. This precludes the reevaluation of the facts and the social experimentation which only a flexible legislature can employ.

The district court perceives it to be the function of this Court to consider all the legislative facts which it has so laboriously accumulated and marshalled, and to use these facts in performing a law-making function. But such an understanding of the function of this Court is unsound and incompatible with the United States Constitution. The function of this Court is to protect the freedoms set forth in the Constitution and to ensure that the division of powers in the State is honored. The Constitution vests Congress, not the judiciary, with the power to make decisions concerning appropriations and disbursements for the general welfare.

Plaintiffs below, having lost their case in Congress, requested the judiciary to write a law which conforms to their preferences. The district court granted them all that Congress had refused. Now they ask this Court to ratify that victory. But the entire tradition of American constitutional jurisprudence stands in their way.

II.

AN AFFIRMANCE OF THE DISTRICT COURT'S DECISION WILL IN PRACTICAL EFFECT OVERRULE THIS COURT'S RECENT DECISIONS IN MAHER v. ROE AND POELKER v. DOE

A. In Effect, the District Court Ordered the Government to Pay for All Abortions, Including Elective Ones, Which a Physician Is Willing to Perform on a Medicaid-Eligible Woman

The issue in this case is whether the Constitution requires the government to fund *elective* abortions.

The lower court held that the government must fund all "abortions that are necessary in the professional judgment of the pregnant woman's attending physician exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age, relevant to the health-related well-being of the pregnant woman." *McRae* v. *Secretary,* 76 C 1804 (E.D.N.Y. January 15, 1980) [hereinafter cited as "slip op."], Judgment at 1-2. This language is taken almost verbatim from the language of this Court in *Doe* v. *Bolton,* 410 U.S. 179, 192 (1973), in which it was used to uphold a law which, as construed, made *illegal* all abortions not encompassed by that description. Thus, the practical effect of the district court's ruling is that all legally permissible abortions, including those heretofore considered purely elective, must be funded.

The holdings in the lower court's opinion, as well as the testimony on which the court relied, reinforce the plain meaning of the court's order. If a pregnancy is "unwanted," in the view of the lower court, that makes an abortion "medically necessary": "The medical evidence emphasized repeatedly the physiological as well as the psychological criticality of the pregnant woman's attitude to

the pregnancy. . . . The long tasks of pregnancy require prenatal care on the woman's part that the woman whose pregnancy is unwanted has neither the will nor the resources of patience to carry out effectively." Slip op. at 111. The court specifically relied on Drs. Hodgson, Eliot, and Momney. *Id.* Dr. Hodgson testified that "every pregnancy that is not wanted by the patient . . . there is a medical indication to abort. . . . I think they are all medically necessary." A at 146. Dr. Eliot, T. at 427, and Dr. Romney, A. at 153, testified that as they use the term "medically necessary," it is a "preventive medicine standard." Dr. Eliot emphasized that an unwanted pregnancy gives rise to a medically necessary reason for an abortion. *See also* testimony of Dr. Sloan who said that whether pregnancy is wanted or unwanted is the "key factor" in determining whether an abortion is "medically necessary," T. at 1734. When the district court's language (*e.g.*, "The unwanted pregnancy is times without number the focus of emotional and psychic disturbance that, especially in the cases of the indigent, are often unsupportable psychically. . . . [U]nwanted pregnancies leading to involuntary childbirth are disruptive of family life" [slip op. at 161-162]) is read in conjunction with its order that "emotional" and "familial" factors can make abortion "medically necessary" and permit a physician to demand reimbursement, there can be little doubt of the utterly unlimited character of the "medically necessary" abortion.

The lower court cited the following circumstances as requiring "medically necessary" abortions:

> —[A] woman already burdened with the care of two retarded children who became pregnant despite use of an IUD. She feared a third child would be retarded, or, if not, beyond her capacity to rear properly in addition to caring for the retarded children.

Slip op. at 118.

> —[W]omen whose pregnancies occur in such circumstances of poverty, slum subsistence in substandard housing, and helpless insecurity that their pregnancies become unendurably stressful and emotionally destructive.

Slip op. at 123.

> —[P]laintiff 'Susan Roe,' [who wrote an affidavit] *expressing her fear* that if she carries her pregnancy to term, she will become an abusive parent like some of her friends.

Slip op. at 130 (emphasis added).

> —[T]he professional standards of medicine accept that grave fetal defects . . . may make abortion medically necessary in the judgment of a large part of the medical profession. [Apparently this is because] The child born with serious birth defects presents a grave threat to family stability and to the rearing of the defective child's siblings.

Slip op. at 130, 309.

> —[The court emphasized that] poverty is itself . . . a medically relevant factor, [permitting the inference that all abortions performed on indigents (*i.e.*, all medicaid recipients) may be certified as "medically necessary"].

Slip op. at 160.

> —[The pregnant teenagers who] run higher risks of unemployment and welfare dependency than those who delay parenthood until their twenties; [Dr. Hoffman testified that *all* abortions for adolescents are medically necessary].

Slip op. at 136; T. at 1342.

Should there be any remaining doubt about the all-encompassing nature of the standard under which the court mandated the government to fund abortions, it is dispelled by the lower court's description of the sense it attributes to "medical necessity" in the opinion of this Court which it "adopts":

> [T]he Court's standard was *not* one of *preserving* life *or health* but a decision inherently and primarily medical but which considered the pregnancy in the total circumstances, medical, societal, familial and economic in which the pregnancy existed.

Slip op. at 89 (emphasis added).

Anyone who reads, or even skims, the district court's voluminous opinion with its exhaustive detailing of virtually every possible social or personal factor which might lead a woman to terminate a pregnancy can have no doubt that in the court's view the consequences of a poor woman continuing a pregnancy she does not want are so horrible that in such instances one could never say an abortion was not, in the court's definition, "medically necessary."

B. The District Court Improperly Distinguished Maher and Poelker By Distorting the Meanings of "Therapeutic" and "Nontherapeutic"

The district court wrote that "[t]he ultimate common holding of these three cases [*Maher, Beal,* and *Poelker*] . . . is . . . that nontherapeutic abortion is an unnecessary medical service . . .," and that when and only when an abortion is not medically necessary, the States may refuse to fund it.

The district court defined therapeutic abortion as follows:

> There is . . . the therapeutic abortion, the abortion the attending physician considers *in some sense* medically necessary to the successful treatment of the health of the pregnant woman. . . . The concern of the attending physician is with determining whether abortion is, in the Supreme Court's language in *Roe* v. *Wade,* 'necessary,' in appropriate medical judgment, for the preservation of the life or health of the mother (410 U.S. at 165).

Slip op. at 84 (emphasis added).

Since the lower court's notion of the "medically necessary" abortion encompasses all that might conceivably fall within the *Bolton* factors (*see* this Brief at 15-18), and thus all legal abortions, the class of "nontherapeutic abortions" becomes a null set.

Concisely stated, what this Court held in *Bolton* is that the right to protect one's health is an aspect of the right to privacy. It then defined "health" very broadly to demark the outer limits of the right to privacy and thus the limits of the State's authority to interfere with and regulate the abortion decision. Indeed, in *Bolton* this Court held that if the abortion is not a "health" abortion, it is *not* protected by the right to privacy and may be proscribed by the State. In *Bolton* the Court upheld a criminal provision in the Georgia abortion statute which punished the performance of an abortion except when it is "based upon the physician's best clinical judgment that an abortion is necessary," *Bolton,* 410 U.S. at 191, when that language was given the saving gloss of the *Bolton* factors which the lower court has now identified with the concept of a "therapeutic abortion." Thus, if the abortion is "medically necessary" as broadly defined by this Court in *Bolton,* it

is immune from state interference. If it is not "medically necessary" in this very broad sense, the abortion does not "relate to health" and falls without the zone of constitutionally protected privacy. Consequently, it is not immune from state interference. Expressed differently, "purely elective" abortions may be proscribed. Surely the constitutional significance of *Maher* and *Poelker* supercedes the commonsense proposition that the State need not fund activities which the State may make illegal. Nonetheless, if the concept of "medical necessity" employed by this Court in *Bolton* to demark the outer limits of the right to privacy in a right to privacy case is transported uncritically, as was done by the lower court, *Maher* and *Poelker* will have the following significance: in practice the state and federal government will have to fund *all* abortions performed by a physician. Only a virtually non-existent class of abortions—those which fall outside the zone of privacy—need not be funded. Expressed differently, the State need not fund abortions which it may proscribe, but it must fund all abortions which the Constitution permits.

This, of course, is an absurd reading of *Maher* and *Poelker*. Indeed, *Maher* and *Poelker* never would have inspired the vigorous dissents if they were so utterly without practical significance.

III.

THE HYDE AMENDMENT WAS ENACTED UNDER THE APPROPRIATION POWER WHICH THE CONSTITUTION VESTS EXCLUSIVELY IN THE CONGRESS

The decision of the district court ordering Congress to pay for abortions violates the United States Constitution, which vests exclusively in the Congress the power to ap-

propriate funds, and the decision ignores the political question doctrine which dictates that the issue is non-justiciable.

A. The District Court's Order Infringes Upon The Appropriations Authority of Congress

The order of the district court contravenes Article I, §9, cl. 7 of the United States Constitution which vests in Congress the sole power to appropriate funds. The Constitution provides:

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law.

U.S. Const. art. I, §9, cl. 7.

The district court mistakenly assumed that Congress appropriated money for the general purpose of Title XIX medicaid expenditures and that, by holding unconstitutional the Hyde Amendment, the appropriations already made by Congress could be used for abortions. This assumption of the district court reflects a fundamental misunderstanding of the Constitution's delegation of the appropriations power exclusively to Congress and ignores judicial precedents in which this Court has refused to arrogate to itself this exclusive "power of the purse."

The Hyde Amendment was authored under House Rule XXI, known as the Holman Rule, which allows amendments to appropriations bills if they are "germane to the subject matter of the bill" or "retrench expenditures by . . . the reduction of the amounts of money covered by the bill." *See*, 7 *Cannon's Precedents of the House of Representatives* §1643 (1936); Rules of the House of Representatives, H.R. Doc. No. 663, 94th Cong., 2nd Sess. 561 (1977). The Hyde Amendment meets both of these requirements.

For over a century the House has ruled that a Holman Rule amendment means that there is no appropriation for the matter or activity for which "none of the funds contained in this act shall be used. . . ." 7 *Cannon's Precedents of the House of Representatives* §1643. *See also Doe* v. *Mathews*, 420 F. Supp. 865, 870-71 (D.N.J. 1976).

Thus, the Hyde Amendment, having been proposed under the Holman Rule, became part of the HEW appropriation Act itself.

The Hyde Amendment is not a "substantive" amendment to Title XIX in the sense that it amends the language of that Act. This should be obvious from the fact that an appropriations act expires at the end of the appropriations period—namely, one year later. It would be most unusual for a substantive amendment to an enactment to expire within one year of its enactment when the amendment itself did not so state. Consequently, the Hyde Amendment may reasonably be viewed only as an appropriations act.

The Hyde Amendment, however, does have "substantive" *impact*. It indicates to the States that no federal funds will be available to reimburse the States for abortions other than for those specified in the Hyde Amendment and may induce and encourage the States to follow the example of the Hyde Amendment by accordingly amending state medicaid law. It does not have any further substantive effect on state law.

However, in the event that this Court finds that Title XIX requires the States to fund in the five mandated categories all medically necessary procedures, including abortions, then, *in that event only,* this Court must determine the effect of the Hyde Amendment on the spirit of "cooperative federalism" between the federal government and the States which is the basis for the Medicaid Act

itself. *See King* v. *Smith,* 392 U.S. 309, 313, 316 (1968). The spirit of cooperative federalism teaches that in no event should the States be required to pay for abortions under Title XIX when the federal government does not. To this extent, the Amendment may be viewed as "substantively" amending Title XIX.

However viewed, the Hyde Amendment is a statement by Congress that no funds are appropriated for abortion funding except for the limited categories specifically mentioned on the face of the Hyde Amendment. Thus, the district court is in error in believing that funds exist for all so called "medically necessary" abortions in the general appropriation and that these funds may be disbursed once the Hyde Amendment is enjoined. What Congress actually did with the Hyde Amendment was to appropriate funds for abortions necessary to save the life of the mother and for abortions in which pregnancy resulted from rape or incest. No funds were appropriated for abortions deemed justified by any other circumstance. The fact that funds are now being drawn from the Treasury without an appropriation having been made by Congress is a direct violation of Article I, §9, clause 7 of the United States Constitution.[3]

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[3] The named defendant Secretary is the wrong federal party defendant. To the extent the action is deemed as seeking ultimately a monetary judgment against the Treasury, the proper federal defendant would be the United States of America, and the district court would lack jurisdiction over the controversy under 28 U.S.C. §1346. *See, e.g., Reeside* v. *Walker,* 52 U.S. (11 How.) 272, 289-90 (1850); *Harrington* v. *Bush,* 553 F.2d 190, 194-95 (D.C. Cir. 1977). Alternatively, to the extent it is deemed as an action to require an appropriation of funds, the proper party defendant would be Congress, but the action is barred for lack of waiver of sovereign immunity. *See generally, Reeside* v. *Walker,* 52 U.S. (11 How.) at 298-90; *see also, Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 321 (1937); *Doe* v. *Mathews,* 420 F. Supp. 865, 870-71 (D.N.J. 1976).

This Court has consistently refused to arrogate the appropriations power of Congress to itself in cases in which this important separation of powers question was in issue. *United States* v. *Lovett,* 328 U.S. 303 (1946); *Austin* v. *United States,* 155 U.S. 417 (1894); *Knote* v. *United States,* 95 U.S. 149 (1877); *Hart* v. *United States,* 118 U.S. 62 (1868); *Reeside* v. *Walker,* 52 U.S. (11 How.) 272 (1850).

In *Knote* v. *United States* this Court refused to award the petitioner the proceeds from the sale of his property confiscated by the federal government under a confiscation act after he was pardoned. This Court said:

> If the proceeds (of the sale) have been paid into the Treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Monies once in the Treasury can only be withdrawn by an appropriation by law.

Knote v. *United States,* 95 U.S. at 154.

Reeside v. *Walker* is equally clear, this Court writing:

> No officer, however high, not even the President, much less a secretary of the treasury or treasurer is empowered to pay debts of the United States generally, when presented to them. If, therefore, the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the treasury department, the plaintiff would be as far from having a claim on the secretary or treasurer to pay it as now. The difficulty in the way is the want of any appropriation by congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the treasury except under an appropriation by Congress. See Constitution, Art. I, §9, I Stats. at Large, 15.

> However much money may be in the treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.
>
> Hence, the petitioner should have presented her claim on the United States to congress, and prayed for an appropriation to pay it. If congress after that make such an appropriation, the Treasury can, and doubtless will, discharge the claim without any *mandamus.* But without such an appropriation it cannot and should not be paid by the treasury, whether the claim is by a verdict or judgment, or without either, and no *mandamus* or other remedy lies against any officer of the treasury department, in a case situated like this, where no appropriation to pay it has been made.

Reeside v. *Walker,* 95 U.S. at 154 (emphasis in original).

The district court's discussion of *United States* v. *Lovett,* 328 U.S. 303 (1946), indicates that it believed *Lovett* to be indistinguishable from this case. Slip op. at 289-290. *Lovett* involved the enactment of an appropriations bill to which an amendment was attached that barred, after Nov. 15, 1943, the payment of any past, present, or future monies appropriated for the salary or compensation of three named federal employees except as jurors or soldiers. Congress enacted the measure because it suspected these three persons had engaged in un-American activities but the Executive branch refused to discharge them. The district court found in *Lovett* not only the authority for judicial scrutiny of an appropriation of Congress but also the authority to order an appropriation.

Lovett differs significantly from this case. In *Lovett* this Court held that the purpose of Congress was "not merely to cut off respondents' compensation through regular dis-

bursing channels but permanently to bar them from government service. . . ." The Court said further that the "language as well as the circumstances of its passage . . . showed that no mere question of compensation procedure or of appropriations was involved, but that it was designed to force the employing agencies to discharge respondents and to bar their being hired by any other government agency." *United States* v. *Lovett,* 328 U.S. at 314. This Court found the statute to be unconstitutional as a bill of attainder and therefore it did not stand as an obstacle to payment of compensation to the three federal employees. 328 U.S. at 318.

The *Lovett* Court did not order Congress to appropriate funds to the respondents, it merely allowed compensation. *Lovett* and the other respondents received compensation only because Congress, after extended debate, voted (99-98) to pay them. 93 Cong. Rec. 2973-75, 2977, 2987-91 (1947). The district court finds support in *Lovett* for judicial scrutiny, slip op. at 290, but this Court's review was related to the "bill of attainder" aspect of the case, not the appropriations aspect. Here, the district court has gone far beyond *Lovett* into the exclusive role of Congress to appropriate funds. *Lovett* provides no support for the district court's ruling.

It should be noted that another federal court, in *Doe* v. *Mathews,* 420 F. Supp. 865 (D.N.J. 1976), reached a conclusion opposite to that of the district court here in ruling on the question of whether the Hyde Amendment was an exercise of the appropriations power of Congress. the court in *Doe* v. *Mathews* said that a declaratory judgment that the Hyde Amendment is unconstitutional or an injunction against the Secretary of Health, Education and Welfare prohibiting enforcement of the Hyde Amendment

would be "a futile and meaningless judgment. This is because of the fact that if Secretary Mathews were to ignore the Hyde Amendment pursuant to such a judgment, the Secretary of the Treasury would remain bound to observe the Hyde Amendment and refuse to draw any monies out of the Treasury for payment of a federal share to a Medicaid State on account of elective abortions." *Doe* v. *Mathews,* 420 F. Supp. at 870-871.

The district court relies heavily on this Court's recent ruling in *Califano* v. *Westcott,* ..... U.S. ....., 99 S. Ct. 2655 (1979). Challenged in *Westcott* was the constitutionality of Section 407 of the Social Security Act, 42 U.S.C. §607, the "Aid to Families with Dependent Children, Unemployed Father" (AFDC-UF) provision. This program provides benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father, but provides no benefits in case of unemployment of the mother. This Court, after concluding that the gender classification does not substantially relate to the attainment of any important and valid statutory goals, faced the problem of fashioning a remedy. Two alternatives were considered: 1) declare the statute a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or 2) extend the coverage to include those who are aggrieved by the underinclusive classification. *Califano* v. *Westcott,* 99 S.Ct. at 2663. This Court noted that approximately 300,000 needy children were receiving benefits under the program and "an injunction suspending the program's operation would impose hardships on beneficiaries whom Congress plainly means to protect." *Califano* v. *Westcott,* 99 S.Ct. at 2664. Therefore, the Court merely extended the benefits to include families in which either the mother or father is unemployed within the meaning of the Act.

1) The district court's reliance upon *Califano* v. *Westcott,* slip op. at 285, 288-289, 292, is ill-founded for two important reasons.

In *Westcott,* this Court noted that "all parties before the district court agreed that extension was the appropriate remedy. . . . Appellees support that remedy here, and the Secretary, while arguing in favor of §407's constitutionality, urges that, if the statute is invalidated, the district court's remedy [of expansion of the program] should be affirmed." *Califano* v. *Westcott,* 99 Sup. Ct. at 2664. This agreement of the parties in *Westcott* is extremely significant since it practically and theoretically removed the appropriations issue from consideration by the *Westcott* court whereas here the appropriations issue lies at the heart of this dispute.

2) *Califano* v. *Westcott* did not involve an Act of Congress that explicitly refused to appropriate funds for a certain purpose, as is the case here. And thus it was reasonable for this Court in *Westcott* to infer that Congress would have preferred to benefit the excluded class as opposed to depriving the intended beneficiaries of benefits. It would be manifestly unreasonable for this Court to reach such a conclusion here, since every time the issue of the funding of abortions has been before Congress, Congress has refused to fund. Here, the intention of Congress not to fund abortion is unmistakable. Indeed, the entire HEW-Appropriations Bill was held up until an acceptable agreement on Hyde Amendment language could be worked out. *See, e.g.,* slip op. annex. at 218, 224-225, 302.

Thus, *Westcott* cannot be cited as authority for a judicial power to appropriate funds. At best, it stands for the proposition that this Court has the authority to determine the intent of Congress with respect to a welfare enactment

and to order an expenditure if it would be reasonably consistent with congressional intent. If such is the case, it is Congress who has appropriated, not the Court. Here, of course, no such intent is discoverable, since no such intent existed.

Nor is it persuasive that the federal government funded abortion until the first Hyde Amendment in 1976. The fact that abortion was funded for a several year period prior to the first Hyde Amendment only supports the conclusion that the statutory language of Title XIX is capable of being construed to permit the funding of abortion, not that Title XIX requires such funding or that Congress approved of such funding. *Beal* v. *Doe,* 432 U.S. 438, 446 n. 10 (1977).

B. The Hyde Amendment Raises A "Political Question" Which the Judiciary Should Not Review

Appropriation matters are essentially political in nature,[4] are best resolved by the legislature, and are not suit-

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[4] The Hyde Amendment has been the subject of extremely protracted and heated debate in Congress. *See:*

122 Cong. Rec. H 6647-6661 (daily ed. June 24, 1976);
122 Cong. Rec. S 10787-10807 (daily ed. June 28, 1976);
122 Cong Rec. H 8631-8641 (daily ed. August 10, 1976);
122 Cong. Rec. S 14562-14570 (daily ed. August 25, 1976);
122 Cong. Rec. H 10312-10318 (daily ed. September 16, 1976);
122 Cong. Rec. S 16112-16121 (daily ed. September 17, 1976);
122 Cong. Rec. S 17296-17302 (daily ed. September 30, 1976);
123 Cong. Rec. H 6082-6098 (daily ed. June 17, 1977);
123 Cong. Rec. S 11041-11056 (daily ed. June 29, 1977);
123 Cong. Rec. H 8327-8353 (daily ed. August 2, 1977);
123 Cong. Rec. S 13668-13678 (daily ed. August 4, 1977);

(footnote continued)

ed to judicial review. In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court discussed in some detail the nature and applicability of the doctrine of nonjusticiability or the political question doctrine, concluding that "it is the relationship

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(footnote continued)

123 Cong. Rec. H 10128-10134, 10170 (daily ed. September 27, 1977);
123 Cong. Rec. H 10829-10838 (daily ed. October 12, 1977);
123 Cong. Rec. H 10966-10970 (daily ed. October 13, 1977);
123 Cong. Rec. S 17900-17902 (daily ed. October 27, 1977);
123 Cong. Rec. S 18584-91, S 18621-22 (daily ed. November 3, 1977);
123 Cong. Rec. H 12167-12175 (daily ed. November 3, 1977);
123 Cong. Rec. S 19236-19240 (daily ed. November 29, 1977);
123 Cong. Rec. H 12485-12494 (daily ed. November 29, 1977);
123 Cong. Rec. H 12651-12658 (daily ed. December 6, 1977);
123 Cong. Rec. H 12770-75, H 12929-31 (daily ed. December 7, 1977);
124 Cong. Rec. H 5363, H 5371 (daily ed. June 13, 1978);
124 Cong. Rec. H 10798-10800 (daily ed. September 26, 1978);
124 Cong. Rec. S 16312-16338 (daily ed. September 27, 1978);
124 Cong. Rec. H 11493-97 (daily ed. October 4, 1978);
124 Cong. Rec. H 12468-87, H 12516-20 (daily ed. October 12, 1978);
124 Cong. Rec. H 12969-71 (daily ed. October 14, 1978);
125 Cong. Rec. H 5253-5262 (daily ed. June 27, 1979);
125 Cong. Rec. S 9851-9873 (daily ed. July 19, 1979);
125 Cong. Rec. S 13253-55 (daily ed. September 24, 1979);
125 Cong. Rec. S 13573-75 (daily ed. September 27, 1979);
125 Cong. Rec. S 13736-43 (daily ed. September 28, 1979);
125 Cong. Rec. H 8856-58 (daily ed. October 9, 1979);
125 Cong. Rec. S 14325 (daily ed. October 10, 1979);
125 Cong. Rec. H 9884-86 (daily ed. October 30, 1979);
125 Cong. Rec. S 16710-14 (daily ed. November 15, 1979);
125 Cong. Rec. H 10955-59 (daily ed. November 16, 1979);
125 Cong. Rec. S 16882-83 (daily ed. November 16, 1979);
125 Cong. Rec. H 11614-11623 (daily ed. December 6, 1979);
125 Cong. Rec. H 11770-76 (daily ed. December 11, 1979).

between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the political question." *Baker* v. *Carr*, 369 U.S. at 210. To determine if that doctrine should be invoked, this Court set forth certain guidelines:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding it without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherance to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. *Carr*, 369 U.S. at 217.

Although the issues presented to this Court here are different from those in *Baker*, which upheld the justiciability of legislative reapportionment, at least some of the "tests" for determining whether to apply the political question doctrine are applicable here and should guide this Court in its review of the judgment of Congress involved in this case.

For example, in this case there is a "textually demonstrable constitutional commitment of the issue" of the appropriations power to Congress, "a coordinate political department" under Article I, §9, cl. 7 of the U.S. Constitution. There is a "lack of judicially discoverable and manageable standards" for determining which, and to what extent, the State can most wisely promote and protect with its limited resources the various and conflicting legitimate

state interests involved in the abortion decision. There is the "impossibility of deciding, without an initial policy determination of a kind clearly for nonjudicial discretion" which of the various conflicting legitimate state interests at stake in abortion should be preserved. There is the "impossibility of undertaking independent resolution" of the issue of whether the courts should promote the health of citizens—if indeed "health" is significantly endangered—rather than other important and legitimate state interests "without expressing lack of respect due coordinate branches of government." Finally, there is the "potentiality of embarrassment from multifarious pronouncements by various departments" (here, from the Congress and the judiciary) "on one question": how various legitimate, perhaps competing, state interests should be promoted with the resources available to the State. Clearly, many of the tests for invocation of the political question doctrine are satisfied here.

Even if the close relationship between this case and "political question" cases does not counsel a finding of nonjusticiability, it certainly counsels judicial restraint, a low level of judicial review, and judicial deference to appropriations decisions of Congress.

This Court has held that the President has no power to impound funds which Congress has expressly directed to be spent. *Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838). *See also Train* v. *City of New York,* 420 U.S. 35 (1975). Such decisions promote respect for and protect separation of powers and our system of checks and balances. Nothing less is at stake here.

The various demands which the Congress makes upon the Treasury to further and protect valid governmental interests should not be subject to judicial review merely

because an individual physician believes a particular medical procedure is "necessary."

As Mr. Justice Stewart, writing for this Court, stated in *Dandridge* v. *Williams,* 397 U.S. 471, 478 (1969),

> [t]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public funds among the myriad of potential recipients.

IV.

THE HYDE AMENDMENT IS CONSTITUTIONAL

A. The Hyde Amendment Burdens No Fundamental Constitutional Right

1. There is No Due Process Right to Any Governmentally Subsidized Abortion

In *Maher* v. *Roe,* 432 U.S. 469 (1977), this Court held that there exists no due process right to a state subsidized abortion:

> The Constitution imposes no obligation [on the State] to pay the pregnancy related expenses of indigent women, *or indeed to pay any of the medical expenses of indigents.*

Maher v. *Roe,* 432 U.S. at 487 (emphasis added).

Since there exists no due process right to receive government funds for any medical procedure, there can exist no due process right to a governmentally subsidized "medically recommended" abortion.

Nevertheless, the district court found that the Constitution requires the State to further, through the use of public funds, its interest in maternal health in preference to any other interest, or at least in preference to the State's interest in the protection of fetal life. Although the court's

statement of its rationale is obscure, it is at least clear that this supposed constitutional mandate is based on a finding that the Amendment in some fashion unduly burdens an alleged due process right of privacy which encompasses a "medically recommended' abortion. Slip op. at 310, 312.

The district court relies upon several of this Court's prior abortion decisions involving criminal statutes to support its theory that the State is constitutionally required to "prefer" maternal health or it will violate the due process rights of the woman. *See* slip op. at 310, 319-320.

In *Roe* v. *Wade,* this Court held that the State could not penalize abortions performed to preserve maternal health even after fetal viability when the State maintains a compelling interest in fetal life. 410 U.S. at 164. *Danforth* held that Missouri's ban on saline amniocentesis was unconstitutional because, as a practical matter, it caused the physician to employ techniques of abortion less likely to preserve maternal health. 423 U.S. at 79. *Colautti* found a Pennsylvania standard of care statute unconstitutional in an opinion that stressed the need to provide the physician with "broad discretion" in the context of such criminal laws. 439 U.S. at 394. From these decisions the district court concluded that the Constitution "appears to imply that any regulation of abortion must not preclude the physician from using the methods of medical management that preserve the woman's health and life as against fetal life when the interests conflict." Slip op. at 320. Whatever the validity of this conclusion in the context of criminal statutes—and all the decisions cited by the district court concern punitive laws—it can have no application here.

Roe v. *Wade* holds that the boundaries of the woman's zone of privacy are such that they may not be crossed by

the State when a health interest of the woman is asserted, even when there is a compelling interest at stake.[5]

But there "is a basic difference between direct state interference with a protected activity and state encouragment of an alternative activity consonant with State policy." *Maher* v. *Roe,* 432 U.S. at 475. It is one thing for the State to proscribe or penalize performance of an abortion a physician deems necessary. It is quite another thing for the State to encourage the physician through allocation of public funds to employ alternative methods of medical care for the woman in order to preserve both its interest in the protection of fetal life and its interest in maternal health. "There is nothing in the Constitution . . . that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has." *Geduldig* v. *Aiello,* 417 U.S. 484, 496 (1974) (Stewart, J.).

This is not a "right to privacy" case. It does not involve direct state interference in the woman's right to privacy. Like *Maher,* this case involves the disbursal of public funds through a governmental social and economic program to encourage childbirth. Therefore, the principles of this Court's prior decisions involving criminal statutes found to burden or interfere with the exercise of conduct protected by due process do not apply here. The privacy right is a right to be free from unduly burdensome state interference in seeking an abortion. This right is not altered by the reason for which the abortion is sought, whether that reason is purely "elective" or whether it is because the abortion is believed "medically necessary."

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[5] It is also apparent, however, that the State may at least regulate the manner in which the right is effectuated in such a context. *Planned Parenthood* v. *Danforth,* 423 U.S. at 99-101. *See also Wynn* v. *Scott,* 449 F. Supp. 1302, 1320-1321 (N.D. Ill., three judge court, 1978).

Moreover, since the woman cannot claim a due process right to state support for any abortion decision, neither can her physician. As this Court held in a unanimous opinion:

> The doctors rely on two references to a physician's right to administer medical care in the opinion in *Doe* v. *Bolton,* 410 U.S. at 197-198, and 199. Nothing in that case suggests that a doctor's right to administer medical care has any greater strength than his patient's right to receive such care. The constitutional right vindicated in *Doe* was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedure were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. *If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution.*

Whalen v. *Roe,* 429 U.S. 589, 604 n.33 (1977)(emphasis added).

Due process requirements of the Constitution create a sphere of privacy within which certain conduct must remain free from state interference. As this Court has held, the right to procure abortion falls within the boundaries of this zone. But as this Court has also held, the freedom or immunity which the Constitution provides for such decisions implies no affirmative state obligation whatever to implement their exercise. In *Whalen,* this Court adopted the view of Professor Philip Kurland that the privacy right is (as here relevant) "the right of an individual to be free in action, thought, experience, and belief from governmental compulsion." Kurland, *The Private* I, 1978 University of Chicago Magazine 7, 8 (Autumn 1978). Quoted in *Whalen* v. *Roe,* 429 U.S. at 599.

Undoubtedly, the government may choose to assist individuals in their exercise of activities which fall within the zone of privacy. *Maher* v. *Roe,* 432 U.S. at 480. Whether or not the government does so, however, is solely a matter for the State to decide in light of its valid interests as the State perceives them to be affected. "Governmental decisions to spend money to improve the public welfare in one way and not another are not confided to the courts." *Mathews* v. *DeCastro,* 429 U.S. 181, 185 (1976), (Stewart, J.). The *private* interests which might lead an individual to exercise the right to seek abortion—whether an "elective" abortion, a eugenic abortion, or a "medically recommended" abortion—cannot affect consideration of the constitutional validity of such state funding decisions. Such asserted private interests become public interests only by way of the political process. Indeed, this is precisely the purpose for which our legislative institutions were created:

> Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.

Dandridge v. *Williams,* 397 U.S. 471, 487 (1970) (Stewart, J.). Such problems are the business of Congress.

The lower court erred insofar as it held that there exists a due process right to any funded abortion which might be claimed by the woman or her physician.

2. The Hyde Amendment Neither Penalizes The Due Process Right to Privacy Nor Creates an Unconstitutional Condition on Its Exercise

Although there clearly exists no due process right to any governmentally subsidized abortion, the district court nevertheless found that the Hyde Amendment unduly burdens the woman's due process right to privacy by creating a penalty or a condition on its exercise:

> To overrule the medical judgment, [of the physician that abortion is "medically necessary"] . . . and withdraw medical care at that point because the medically recommended course prefers the health of the pregnant woman over the fetal life is an unduly burdensome interference with the pregnant woman's freedom to decide to terminate her pregnancy when appropriate concern for her health makes that course medically necessary. To deny the appropriate medical assistance to the patient in need of medical assistance and remit her to a less appropriate medical course and abandonment of her fundamental right of choice, or else to resignation of medicaid benefits is not called for by *Maher* v. *Roe* and is forbidden by the principle its reaffirms.

Slip op. at 312.

Elsewhere, the district court expressed the same concept more plainly. In its view, the Hyde Amendment imposes a "penalty" on the exercise of a woman's right to privacy because she is "effectively denied assurance of a basic necessity of life (*Memorial Hospital* v. *Maricopa,* 415 U.S. 250, 259 [1974]) because of her medically advised decision." Slip op. at 314.

Both conclusions utterly distort the intent and effect of the Amendment. First, the Hyde Amendment does not "overrule medical judgment." It simply does not provide physicians with reimbursement for having performed certain abortions.

Second, the Hyde Amendment does not "withdraw medical care." It provides that physicians will not be paid for performing a certain procedure. All alternative forms of treatment for any health difficulty encountered by the woman during pregnancy are reimbursed.

Third, the Hyde Amendment does not deny physicians reimbursement because the physician's "recommended course prefers the health of the woman over fetal life" but simply because the operation he proposes involves the destruction of fetal life contrary to valid state interests.

Fourth, the Hyde Amendment does not deny a "basic necessity of life." Abortions necessary to preserve life are funded; alternative medical procedures to preserve health are funded. In any case, the State is under no obligation to provide "the most basic economic needs." *Dandridge* v. *Williams,* 397 U.S. at 485.

It is important to understand the roots of penalty analysis. A penalty is a way of punishing an individual for some act by taking something away from that individual in retribution for the act. A penalty is retribution for, not a failure to assist, a perceived wrong. By definition, a penalty is something over and above thwarting the act penalized. If a physician is denied reimbursement for a fraudulent claim, this merely prevents the success of the fraud. But if a physician is denied eligibility for any future medicaid reimbursement, that is a penalty.

The application to this case is obvious—as *Maher* explicitly declared. The fact that an abortion is "medically necessary" rather than "elective" does not alter the reality that a failure to fund is not a penalty.

The mere "judgment" of a *physician* that an abortion is "recommended" does not logically generate any *state* burden on or interference with his patient's privacy right.

Certainly, the physician-class is nowhere vested by the Constitution with a right to demand taxpayer subsidies for whatever medical procedures it might recommend, much less to dictate through an exercise of "medical judgment" that an Act of Congress be stricken. After all, the Constitution vests authority to legislate for the general welfare in the Congress, not in the physician-class.

If a physician may properly demand reimbursement from the State for any "medically recommended" abortion, then the "professional judgment" of a school teacher that to instruct a student in German is "educationally recommended" would be equally sufficient to oblige the State to pay for such an education. Yet such a line of reasoning has already been specifically rejected by this Court. *Maher* v. *Roe,* 432 U.S. at 476-477. It must likewise be rejected here.

The district court's reliance on *Memorial Hospital* to find a "penalty" here is particularly inappropriate in view of this Court's prior rejection of any analogy to that case or to *Shapiro* v. *Thompson,* 394 U.S. 618 (1968), in the abortion funding context:

> Appellee's reliance on the penalty analysis of *Shapiro* and *Maricopa County* is misplaced. In our view there is only a semantic difference between appellees' assertion that the Connecticut law unduly interferes with a woman's right to terminate her pregnancy and their assertion that it penalizes the exercise of that right. Penalties are most familiar to the criminal law, where criminal sanctions are imposed as a consequence of proscribed conduct. *Shapiro* and *Maricopa County* recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.
>
> If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro,* and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers.

Maher v. *Roe,* 432 U.S. at 474-475 n.8.

The district court's logic would require the State "to pay for the bus fares of indigent travelers" whenever a physician believes their relocation is "medically recommended." The private judgment of a physician that either an abortion or relocation is "medically recommended" does not create an obligation on the State where none existed before. There is simply no logical or legal ground to hold that penalty analysis should be applied here when it was not applied in *Maher.*

Moreover, unlike the situations in *Shapiro* and in *Maricopa,* no "general welfare benefits" are denied by the Amendment to any woman who decides to abort upon her physician's recommendation. It is only the abortion procedure itself that the State declines to fund, and this decision is not based upon any animus directed at the woman because she has exercised a fundamental right; it arises out of the special character of a procedure which causes fetal death. In fact, a basic premise of the *Maher* decision was that the State has an important interest in the fetus and may make a value judgment favoring childbirth over abortion. To assume that the failure to provide funds for a woman's abortion is a penalty totally misses the purpose of the Hyde Amendment, which is not to punish but to encourage the positive goal of protecting the important state interest in the fetus.

Like the constitutionally valid California insurance plan which declined to fund pregnancy related disability while providing disability benefits for other reasons upheld in *Geduldig* v. *Aiello,* 417 U.S. 484 (1979), the Hyde Amendment "does not exclude anyone from benefit eligibility because of a characteristic of the individual but merely removes one physical condition . . . from the list of compensable disabilities." *Id.* at 496 n.20. Under the Hyde Amendment, *no* condition—whether pregnancy or medically complicated pregnancy—is excluded from compensation. Rather, only one alternative *treatment* for pregnancy or its complications is excluded. The rationale of *Gedulig* applies with even greater force here.

The sole purpose of the durational residency requirements at issue in both *Shapiro* and *Maricopa County* was to punish an exercise of the fundamental right to interstate travel. As this Court held, "if a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional." *United States* v. *Jackson,* 390 U.S. 570, 581 (1968), quoted in *Shapiro* v. *Thompson,* 394 U.S. at 631 (1968). However, the Hyde Amendment's purpose is not to "chill" the exercise of one fundamental right, but to encourage the exercise of another—the fundamental right to continue to bear and to give birth to a child, and thereby to promote the State's important interest in prenatal human life.

In *Maricopa County,* the durational residency requirement at issue did not provide the affected class with "means to obtain alternative treatment." *Memorial Hospital* v. *Maricopa County,* 415 U.S. at 260-261. But the very purpose of the Hyde Amendment is to encourage use of alternative treatment so that both the State's valid interest in the life of the fetus and its interest in the woman's health

might be furthered. In providing funds for abortion when the mother's life is endangered and providing funds for treatment alternative to abortion in all other situations in which there are pregnancy complications, the government hopes to protect all its interests to the maximum extent.

3. No Due Process Right to Funded Abortion Is Created by The Medicaid System

Although the legal basis for its conclusion is absent, the district court appears to strike the Amendment on Constitutional grounds because, in its view, the woman has a *statutory* entitlement to medical assistance:

> The medicaid eligible woman who is pregnant has a statutory entitlement to medical assistance, and, if her pregnancy becomes a problem pregnancy, her entitlement extends to receiving the medical treatment appropriate to her medical problem, the treatment which is recommended by her attending physician's judgment . . . . Since the recommended abortion is medically necessary to safeguard the pregnant woman's health, and her basic statutory entitlement is to appropriate medical assistance, the disentitlement to medicaid assistance impinges directly on the woman's right to decide, in consultation with her physician and in reliance on his judgment, to terminate her pregnancy in order to preserve her health.

Slip op. at 312-313.

This approach is fundamentally inapposite. The language of "statutory entitlement" is appropriate in the context of *procedural* due process. *Goldberg* v. *Kelly,* 397 U.S. 254, 262 (1970). But as Mr. Justice Stewart, speaking for this Court, noted in *Richardson* v. *Belska,* 404 U.S. 78, 80-81 (1971) (citations omitted):

> Our decision in *Goldberg* v. *Kelly*, upon which the District Court relied, held that as a matter of procedural due process the interest of a welfare recipient in the continued payment of benefits is sufficiently fundamental to prohibit the termination of those benefits without a prior evidentiary hearing. But there is no controversy over procedure in the present case, and the analogy drawn in *Goldberg* between social welfare and "property" cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.

The conceptual basis for according constitutional protection to the process by which governmental benefits are terminated or reduced is that a statutory entitlement constitutes a form of "property." *Goldberg* v. *Kelly*, 397 U.S. at 262 n.8. Once one has a property interest, one cannot be deprived of it by the government without due process of law. But "[p]rotected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss* v. *Lopez*, 419 U.S. 565, 572-573 (1975) (citation omitted).

Since the statute is the *source* of the constitutionally protected property interest, and since it defines the "dimensions" of that interest, it is conceptually incoherent to "bootstrap" a *substantive* constitutional right to property in benefits which are *not* included in the statute to a *procedural* constitutional right to property in *other* benefits which *are* provided in the statute.

The error of the lower court is to regard the statute as though it had extended some general entitlement to all "medical assistance . . . recommended by [an] attending physician", slip op. at 312-313, and then, once it had done

this, had then unconstitutionally deprived recipients of their property in such assistance by failing to provide funds for certain services. But what the statute in fact does is to extend an entitlement to some, specified medical assistance[6]—assistance which does not include abortions except under particularly described circumstances. Of course, when the legislature sets standards of eligibility and coverage it must comply with the equal protection clause (*see* this Brief at 54 ffl.), but it can hardly be maintained that, once the legislature decides to provide coverage of some items, it thereby creates a property right in all other items which, by any conceivable principle of generalization, might be deemed by a court to come within the same class. If Congress enacts a program providing veterans who have served more than two years with 50% of tuition benefits in vocational training, it does not create a property right in all veterans who have served any length of time to 100% of tuition in four-year liberal arts programs. Yet, such absurd results would be the logical outcome of accepting the lower court's "entitlement" argument in this case.

Even were the authorizing statutes construed specifically to provide coverage for "medically necessary" abortions, that would not create a statutory entitlement as against an appropriations act curtailing funding for such abortions.

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[6] Even under the broadest reading of the Medicaid Title, that which requires that all "medically necessary" services be funded in certain categories, there are many other categories of treatment which might be "recommended by [an] attending physician" which are purely optional with each state. *See* this Brief at 94, n.27. By no means does the Title provide a "comprehensive" program of services for the medicaid-eligible; indeed, a provision requiring the States to move gradually toward that goal was expressly repealed by the Congress. Act of October 30, 1972, Pub. L. No. 92-603, § 203, 86 Stat. 1410, *repealing* Pub. L. No. 89-97, § 1903(e), 79 Stat. 349 (1965) (*codified in* 42 U.S.C. § 1396b[e]).

The effective existence of the medicaid program depends solely on an allocation of monies by the Congress from year to year, as the Congress deems fit. The program has no other practical reality. A particular individual may properly claim to be within the class of medicaid-eligible recipients under the medicaid statute and that principles of procedural due process apply to prevent her or his exclusion from the class. But under the statute the individual has no property interest, only an "abstract concern," in the *funds* which Congress may or may not annually apply to the program and its purposes. *See Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 576-578 (1972). There is no guarantee in the medicaid program that the Congress will supply funds for any particular purpose—or indeed, any funds at all for any purpose which might fall within the parameters of the program. *Cf. Board of Regents* v. *Roth,* 408 U.S. at 578 n.16. The individual eligible recipient can assert no legitimate claim of entitlement to funds as against Congress when, whatever the character of the authorizing statute, the Congress has reserved to itself the sole power to allocate funds under the statute as the Congress deems appropriate. Otherwise, solely by virtue of the existence of any authorizing statute, any person who maintained a property interest in his status as a potential recipient could demand that funds be allocated for any and all purposes that might arguably fall within the intent of an authorizing statute. Such a circumstance would be absurd in a system of government which vests the legislature with authority to disburse limited public funds. Indeed, carried to its logical extreme, such a theory would revoke the authority of legislatures to repeal or amend previously passed legislation without undergoing judicial scrutiny of the strength and validity of their interests in doing so.

The medicaid program is not a public forum[7] like the streets or parks (for which *see, e.g., Jamison* v. *Texas,* 318 U.S. 413 [1943]) or even a library, *see Brown* v. *Louisiana,* 383 U.S. 131 (1966); there is no right of minimum access

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[7] Apart from areas in which the government exercises a legal monopoly, *see, e.g., Boddie* v. *Connecticut,* 401 U.S. 371 (1971), the public forum cases are the only ones in which, when state interference is not present, it can be plausibly argued that affirmative obligations to make something available are imposed on the government.

These cases rest both on the special character of the traditional "public forums"—public streets and parks—and on the particular nature of the speech and assembly First Amendment freedoms.

The streets and parks have traditionally been regarded as being held in common for the use of the public—maintained and perhaps constructed by the government, but used by the people as individuals:

> Wherever the title of streets and parks may vest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated . . . but it must not, in the guise of regulation, be abridged or denied.

Hague v. *C.I.O.,* 307 U.S. 496, 515-516 (1939) (plurality opinion) (dictum), adopted by the majority of the Court in *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 152 (1969).

Insofar as public forum access rights have been extended beyond open public places to include public buildings and the like, such access has been accorded not by the mere creation of any facility, but only by its deliberate use as a place for this exchange of views among the public. *See Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 549 n.4 (1976).

This also points up the special nature of First Amendment expression rights. They are crucial to the maintenance of our democratic form of government and the integrity of the political process; de-

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It is a pool of money intended to assist a particular class of people in certain ways designated by law rather than to provide the general public with a supply of funds to be used at its discretion. For the district court to have found that each category of treatment which can be funded under the program must be funded under the Constitution was equivalent to holding that, if the government constructs a library, the State must not only provide each member of the general public with access to the library, but must purchase any book for that library which any person might desire to read. Although this Court has held that the government may not exclude those who wish to exercise the prerogatives of free speech from a public forum, it has never held that the government must provide a loudspeaker in order that they may effectively evercise their right in the forum. The Court has never held that in constructing

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signed tc provide the opportunity to persuade, they are inherently *public* in nature.

By contrast, the right to abortion is a privacy right. The "right to privacy" generally attaches to intimate relationship. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (parent and child); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (husband and wife); *Roe* v. *Wade*, 410 U.S. 113 (1973) (physician and patient). The State is forbidden from interfering with privacy rights precisely because a *private* forum which such relational interests form has been acknowledged under the Constitution. But to claim that those who wish to exercise rights to *privacy* may demand the same access to public means to implement their exercise as those who would exercise rights which presume the existence of a public forum overlooks both the peculiar importance of free speech as a public means of effecting popular self-government and the "non-interference" nature of privacy rights. Activities protected as rights of privacy cease to be "rights" at all when exercised outside the zones of immunity that the Constitution provides for them. *Cf. Stanley* v. *Georgia*, 394 U.S. 557 (1969) with *United States* v. *Orito*, 413 U.S. 123 (1973). Hence, there can exist no substantive right to any public assistance to effectuate activities attendant to rights of privacy.

a park, the government must build a speaker's platform. Still less has it held that, when planning such a park, the government must make provision for a baseball field or swimming pool on any theory that, once the government has entered the recreation arena, it must "ensure access" for all recreational uses.

In sum, there is no independent constitutional right to a funded abortion. Nor is such a right somehow created by a governmental decision to fund some, many, or even most medical expenses of the poor, so long as principles of equal protection are not violated. There is no Due Process Right to a funded abortion.

4. The Hyde Amendment Does Not Inhibit the Free Exercise of Religion

The district court held the Hyde Amendment unconstitutional under the First Amendment based on its finding that certain religions make abortion a matter of "responsible personal decision" under conditions which include, but are not limited to, circumstances where abortion is perceived to be in the interests of the mother's health.[8] Slip op. at 326-327. Since the Hyde Amendment does not provide public funds to implement the exercise of a religiously motivated decision to procure an abortion perceived to be necessary to secure maternal health, the district court found that it violated the "liberty protected by the First Amendment" to freely exercise religion. Slip op. at 328.

First, the district court erred by holding that the protection of the Free Exercise Clause extends to abortion decisions merely because they are reached under a perceived religious duty to make important personal decisions con-

[8] It does not necessarily follow that the mother's health would be adversely affected by continued pregnancy because the child is handicapped or because the pregnancy arose from rape or incest.

scientiously. Some witnesses testified that some abortions under some circumstances are permissible, even salutory, if the woman's decision is well-considered and conscientious.[9] That is, some religions require their members to follow their consciences and, if a woman herself decides she ought to have an abortion and does so conscientiously, she ought to conform her conduct to that decision. But to vest such conscientious but individual decisions with the full panoply of First Amendment free exercise rights when they are not mandated by specific and affirmative corporate tenets of some religious group would be to revo-

[9] The district court's apparent finding that branches of Judaism "mandate" abortion in order to secure maternal health, slip op. at 327, is contrary to the evidence. Rabbi David Feldman, witness of the plaintiffs below, appeared to testify at several points that some Reformed and Conservative authorities hold that abortion is "mandated" when done to preserve "health" and for a variety of other reasons, but finally concluded that these authorities actually hold that it is the "woman's decision" which is "absolute":

> Q. Now, based on the variety of teachings that you have described, can a rabbi affirmatively counsel a woman to have an abortion?
>
> A. Yes, he can and he does, and in certain cases, he should. But, of course, she is the final arbiter. She makes the final decision.
>
> Q. Are there any circumstances in which a rabbi could prevent a woman from having an abortion, for example, if he disagreed with her reasons?
>
> A. No, she makes the final decision.
>
> Q. So is it fair to say that Jewish law mandates an absolute respect for the woman's decision?
>
> A. It would seem so. Her welfare is primary and her statement of her welfare is primary.

T. at 1875-1876.

Since the woman's decision is "final" and that decision—whatever it might be—is honored by such religious authorities, it is simply illogical to characterize the effectuation of any such decision whether to procure abortion or not as "mandatory."

lutionize traditional First Amendment interpretation. Any and every decision by an individual who adheres to a religion would require a compelling interest on the part of the government before it could thwart or even "unduly burden" any action by the individual taken in accord with that decision.

But even if such decisions were brought under First Amendment free exercise protection, it would not follow that the government must fashion its public policy to conform with them. *See Gillette* v. *United States,* 401 U.S. 437, 457, 461-462 (1971), which held that the State is not obliged to provide any exception for conscientious objectors, and that drafting of religiously motivated selective conscientious objectors does not violate the Free Exercise Clause. Similarly, the State is not obliged to provide funds for abortion merely because the decision to abort is made in good conscience informed by religious authorities.[10]

[10] The district court relies upon *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), and *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), to support its conclusion that religiously conscientious abortion decisions "exact the legislative tolerance that the First Amendment assures." Slip op. at 327-328.

Unlike the state action in *Yoder* and *Barnette,* however, there is here no state imposed penalty or general disability against indigents for procuring abortion. The litigants in *Yoder* and *Barnette* sought relief from state requirements that students be required to attend secondary school and to salute the flag with a pledge of allegiance. Here, the plaintiffs seek state support to facilitate the exercise of their religious beliefs. Under the theory proposed by the district court, the Amish parents of *Yoder* could claim not only that the Free Exercise Clause exempts their children from secondary education, but that it requires the State to pay for the agricultural education their religion prefers. *But cf. Maher* v. *Roe,* 432 U.S. at 467-77.

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Indeed, to the extent that abortion may be a religious practice—as the district court appears to hold it is for some—the State is positively forbidden to provide funds to facilitate its effectuation. *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1972); *Tilton* v. *Richardson,* 403 U.S. 672 (1971); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). Clearly, the Constitution does not require the State to violate the Establishment Clause in order to facilitate the free exercise claims of its citizens.[11]

(footnote continued)

There is no evidence in the record to demonstrate that the apparent permissive attitude of some religions toward abortion for reasons other than to preserve maternal life either occupies a central place in the practice or doctrine of these religions or represents a consistent or long-standing tradition or belief. To analogize the positions on abortion of these religious bodies to the traditional educational practices of the Amish is, therefore, fundamentally inappropriate. *Cf. Wisconsin* v. *Yoder,* 406 U.S. at 209-212.

[11] The district court implies, slip op. at 328, that the Amendment constitutes a penalty on the exercise of the claimed free exercise rights of indigent clients analogous to the state refusal to provide unemployment compensation benefits to the Seventh Day Adventist who refused to work on Saturdays in *Sherbert* v. *Verner,* 374 U.S. 398 (1963). *But see Maher* v. *Roe,* 432 U.S. at 475 n.8.

In *Sherbert,* this Court held that "appellant's declared ineligibility for benefits derives solely from her practice of religion." *Sherbert* v. *Verner,* 374 U.S. at 404. But for the *Sherbert* appellant's religious belief she would have been eligible for unemployment funds; here no one is eligible for funds for abortion—regardless of her religious persuasion—since Congress has not appropriated any funds for the purpose of obtaining abortions. Thus, the Hyde Amendment does not discriminate between persons based on religious belief, though such discrimination was an important factor in *Sherbert.* 374 U.S. at 406.

The *Sherbert* appellant did not claim that a penalty or condition had been placed upon her free exercise of religion because the State had failed to fund transportation to her church. But if abortion is a religious exercise, that would be the precise analogy.

Furthermore, even if such decisions to abort might properly be vested with the protection of the First Amendment, the proper relief would be to fashion an exemption for bona fide members of those religious organizations which mandate abortion, not to strike the Hyde Amendment entirely. In *Wisconsin* v. *Yoder,* the Court did not declare public education to be unconstitutional; it held that the Amish could not be compelled to participate in it.

The district court's finding that refusal to pay for effectuation of abortion decisions made under the aegis of religion constitutes a violation of the First Amendment is contrary to the decisions of this Court and of lower courts. *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 479 F. Supp. 1172, 1188-1195 (N.D. Ohio, 1979); *Womens Services* v. *Thone,* 48 U.S.L.W. 2392 (D. Neb., Nov. 11, 1979); *Right to Choose* v. *Byrne,* 398 A.2d 587, 595-597 (N.J. Super. 1979); *Woe* v. *Califano,* 460 F.Supp. 234, 236-237 (S.D. Ohio, 1978).

It must be reversed.

5. Summary: The Hyde Amendment Does Not Burden the Exercise of Any Fundamental Right

In summary, the Hyde Amendment creates no condition or penalty and imposes no burden on the woman's fundamental constitutional right to procure a "medically recommended" abortion. Thus, it does not violate the "due process" clause of the Fifth Amendment. Furthermore, analysis has shown that the Hyde Amendment does not impinge upon any fundamental right explicitly or implicitly protected by the Constitution. Therefore, under equal protection analysis, neither strict scrutiny nor any other form of heightened judicial review is applicable. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973). The district court's decision that the Hyde Amendment merits

such scrutiny or review is illogical and finds no support in this Court's prior decisions. The district court's decision must be reversed.

B. Equal Protection of Law It Not Denied by the Amendment

1. The Hyde Amendment Discriminates Against No Suspect Classes

Under standard equal protection analysis, the Hyde Amendment may be subjected to strict judicial scrutiny only if it burdens the exercise of a fundamental right or discriminates against a suspect class. *Maher* v. *Roe,* 432 U.S. at 470. As the preceding sections have shown, no right is burdened for the purposes of due process analysis, and therefore, there can be no fundamental right burdened for the purposes of equal protection analysis.

However, the district court held that the Amendment operated to the disadvantage of a "suspect class:" the "statutory class of adolescents at a high risk of pregnancy as defined in 42 U.S.C. §300a-21(a)." Slip op. at 315. This conclusion was wrong.

Nowhere did the court show that such adolescents might properly be denominated a "suspect class" for the purpose of equal protection analysis under the criteria this Court has established. *See San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 28 (1973); *Johnson* v. *Robison,* 415 U.S. 361, 375 n.14 (1974). Rather, the court decided that pregnant adolescents should be designated a suspect class because they are "disadvantaged" by pregnancy and are "recognized as such by Congress" through the Adolescent Pregnancies Subchapter, 42 U.S.C. §300a-21 *et seq.* (1974-1978 Supp.). Slip op. at 315. Thus, legislative recognition of particular needs an adolescent might have should

she become pregnant is judged to create a suspect class under the Constitution. One statute is then deemed unconstitutional because of the intent expressed in another.[12]

Clearly, a group of individuals does not become a constitutionally suspect class in one context merely because the Congress has established a welfare program for their benefit in another. Otherwise, for example, the many federal programs created to assist the aged or veterans because they are deemed disadvantaged as a result of advanced years or time spent in military service would be sufficient to designate their classes as "suspect." Indeed, the entire class of indigents would become "suspect" under the district court's theory in view of the many federal programs established to satisfy their needs. *But see Maher* v. *Roe,* 432 U.S. at 471.

Regardless of the particular status of pregnant adolescents under the Constitution, there exists no ground on which to declare the Hyde Amendment unconstitutional on account of some special discrimination it imposes on them. Pregnant adolescents are not singled out for special treatment under the Hyde Amendment; the Amendment applies to *all* potential beneficiaries of federal medical assistance.

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[12] 42 U.S.C. §300a-21 (a), the statement of intent of the Adolescent Pregnancies Subchapter, does indicate congressional concern over a "higher percentage of pregnancy and childbirth complication" for the adolescents, but nowhere mentions abortion as a means of solving this problem. It was the intent of this law to "encourage the development of . . . services . . . in order to prevent unwanted early and repeat pregnancies . . . ," not to terminate them.

The Adolescent Pregnancies Subchapter is as much concerned with providing proper care for the fetus as for the adolescent, expressing particular interest in the "low-birth-weight babies," their "developmental disabilities," and the higher rates of "infant mortality and morbidity" associated with adolescent pregnancy. As such, this subchapter is hardly an appropriate vehicle for declaring federal restrictions on abortion payments unconstitutional.

Since the Constitution does not command the Congress to treat any class preferentially—whether "suspect" or not —the Amendment cannot be stricken on equal protection grounds for failure to provide pregnant adolescents with special abortion benefits. Furthermore, since nearly every piece of legislation which is subjected to strict scrutiny review has been invalidated by this Court, a declaration that juveniles are a suspect class would no doubt lead to many undesirable results: invalidating curfews, drinking laws, requirements to attend school, marriage requirements, juvenile codes.

It is settled that no other suspect class is the subject of discrimination when funding is limited for abortions. "An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized . . . [T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." *Maher* v. *Roe,* 432 U.S. at 470-471.

Since no fundamental right is burdened and since no suspect class is created by the Hyde Amendment, strict scrutiny is not required, and the "rational relationship" test is applicable.

2. The Hyde Amendment Is Rationally Related to the Valid State Interest in the Protection of the Fetus

The district court found that the Amendment could not be "sustained under the les demanding rationality test", slip op. at 316, on the grounds that:

> The purposes of the enactments in question that would be inferred from consideration of the debates in Congress would not be constitutionally permissible: the dominant purpose inferable was to prevent exercise of the right to decide to terminate pregnancy, to prevent the funds of taxpayers who disapproved of abortion on moral grounds from being used to finance abortions that were abhorrent to them. No purpose of encouraging normal childbirth was discussed, and no such demographic consideration as the Court suggested in *Maher,* 432 U.S. at 478 n.11, entered into the debates —except in the form of the argument suggesting that the pro-choice position on medicaid had in it elements of an unthinkable "final solution" for poverty.

Slip op. at 319-320.[13]

Curiously, the district court itself then described what it found to be the actual purpose of the Amendment: to prefer the "life of the fetus" except "in the life-for-life case reflected in the life endangerment exception." Slip op. at 319.[14] Yet, as this Court held in *Maher* v. *Roe,* 432

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[13] The court also found that the 1978 and 1979 Amendments were irrational because they failed to include exceptions for severe and long-lasting psychological harms, whereas exceptions for severe and long-lasting physical harm were included. Slip op. at 321-322. Since the current Hyde Amendment contains no such exception the issue is moot and will not be discussed.

The rape and incest exceptions in the present Hyde Amendment did not form a basis for the district court's holding of unconstitutionality.

Apparently, the district court concluded that the Hyde Amendment is also unconstitutional for failure to permit the abortion of handicapped children because it "appears to impose a restriction that did not apply" before *Roe* v. *Wade* (slip op. at 322). In fact, such abortions were clearly illegal in most States before *Roe*. *See* this Brief at 100 n.33. The lower court did not explain why or how, if its conclusion were true, this would render the Hyde Amendment irrational.

[14] The court evidently wished to make facile distinctions between the expressed interest of Congress in the protection of the fetus, prevention of the exercise of the right to terminate pregnancy, prevention of taxpayers' funds from being forced to finance abortions morally abhorent to them, and the encouragement of "normal child-

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U.S. at 478, 478 n.11, protection of the fetus is a perfectly valid governmental interest, and an interest which fully justifies abortion funding restrictions. Moreover, there is no doubt that the Amendment is rationally related to the legitimate governmental interest in protection of the fetus.[15] *See* this Brief at 91-92. It is therefore valid under

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birth." But Congress could not "prevent" the exercise of the woman's right through the Amendment; it could merely encourage those who receive government funding to carry their children to term. Termination of pregnancy—"childbirth"—is "normal" when it is not intended to cause fetal death. If Congress wished to protect the fetus—which the district court finds that it did—then it also wished to encourage "normal childbirth." The distinctions the district court drew are merely semantic.

Moreover, in *Maher* v. *Roe*, 432 U.S. at 474, this Court held that the State could "make a value judgment favoring *childbirth* over abortion and . . . implement that judgment by the allocation of public funds." (Emphasis added.) The qualifying adjective "normal" was not used. Thus, the claim by a physician that complications may make a particular pregnancy and childbirth other than "normal" in no way reduces the legitimacy of the State's interest prefering childbirth over abortion.

[15] The Hyde Amendment also rationally relates to the government's valid interest in the recognition of one moral precept of the American people. One of the reasons articulated in support of the Amendment was to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant. For example, Senator James Buckley, in support of the Hyde Amendment, stated that Congress should not permit federal funds to be disbursed for a "procedure that appalls the conscience of a very substantial percentage of the American taxpayers." 122 Cong. Rec. 20410 (1976). Senator Bartlett said, "I just do not think . . . we should feel we have a right or an obligation to finance abortions, which are simply considered an anathema by many, many people in this country." 122 Cong. Rec. 27679 (1976). Respect for the consciences and moral precepts of its citizens has always been considered a legitimate end of state.

the rationality test. *San Antonio School District* v. *Rodriguez*, 397 U.S. 471, 489 (1969). *See also Maher* v. *Roe*, 432 U.S. at 479-480. Obviously, the district court's finding that the Hyde Amendment fails the rational basis test does not arise out of the usual principles of equal protection analysis. Rather, it is based on the theory that the State's valid interest in protection of the fetus becomes "insufficient" when it "conflicts" with its interest in maternal health.

The district court first erred when it sought to characterize the effect of the Hyde Amendment as placing the government's interest in protection of fetal life in direct and inevitable opposition to its interest in maternal health. Since effective medical services other than abortion continue to be provided, the Hyde Amendment, by encouraging medicaid recipients to employ these alternate forms of treatment, effectively serves both the State's interest in fetal life and its interest in maternal health.

The most that can be said about the illusory "conflict of state interests" which the district court claims is generated by the Hyde Amendment is that the Amendment has the effect of discouraging the physician from performing a procedure—abortion—which he "prefers" or would recommend." Slip op. at 312. If there exists a conflict of interests in this context, it therefore arises out of the physician's disagreement with the manner in which the government has balanced its interests, not as the result of any inherent conflict between governmental interests in maternal health and in fetal life. Such a "disagreement" is properly resolved through democratic process; it has no constitutional significance. As Mr. Justice Stewart, speaking for this Court, has stated, "Governmental decisions to spend money to improve the general welfare in

one way and not another are not confided to the courts." *Mathews* v. *DeCastro,* 429 U.S. 181, 185 (1976). Thus, even if a conflict between the government's interest in fetal life and its interest in maternal health were actually created by the Hyde Amendment, the balance to be made between these interests in a state's social and economic programs would be a legislative, not a judicial matter. A Congressional decision to spend money "in one way" (to protect fetal life) and "not another" (to further maternal health) in order to further its valid interest in fetal life was not a proper concern of the district court. The Constitution does not command the government to prefer one valid interest over the other; it only forbids the government to serve illegitimate interests.

The declaration by the district court that, on balance, the United States must further its interest in maternal health above its interest in fetal life, or it will violate the Constitution, tends to corrupt the nature of a system of government which allocates the function of balancing public interests to the Congress. Courts must not "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass law." *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 (1963). This substitution is precisely what the district court did in its decision.[16]

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[16] The court relies on *White* v. *Beal,* 555 F.2d 1146 (3rd Cir. 1977), and the statutory analysis section of *Pre-Term* v. *Dukakis,* 591 F.2d 121 (1st Cir. 1979), to support its argument that the Amendment is constitutionally irrational, although both involve only statutory construction of Title XIX. Slip op. at 317, 321. Whatever the validity of these decisions as interpretations of the requirements imposed on the States by the Medicaid Title (*see* this Brief

(footnote continued)

The Constitution does not declare that social and economic programs must fail the rationality test merely because, in an effort to further some other legitimate state interest, the State fails to reimburse the physician for some procedure he believes is medically recommended. If, as the district court appears to hold, slip op. at 319-320, this Court's prior abortion decisions mean that the State's interest in protecting the fetus somehow becomes irrational whenever it is perceived to "conflict" with the government's interest in maternal health, then there is no basis by which any other legitimate state interest can survive the same test. Suppose that the government refused to reimburse a certain kind of abortion procedure because it cost too much. Clearly, the valid fiscal interest of the State expressed by such a refusal would not become "insufficient" when it "conflicts" with a physician's medically recommended course of treatment. The government's interest in the fetus at stake in the present context is no less legitimate than the government's fiscal interest which would be asserted if abortion subsidies were reduced for excessive cost.

Moreover, there can be no logically defensible way to restrict the district court's principle of "maternal health primacy" to the immediate context of the Medicaid Title.

(footnote continued)

at 90) the objectives and norms of the Social Security Act have not been incorporated into the Constitution. Exceptions in a statute pass the rational test required by our Constitution if they rationally relate to a valid state interest, regardless of what other interests the general statute purports to serve. "Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point." *Geduldig* v. *Aiello,* 417 U.S. at 495.

If there is an asserted need for public hospitals, does it become unconstitutional for the State to build public schools instead? It would seem so for, under the district court's finding, the nature of the government's interest in health causes conflicting interests to become "insufficient." Slip op. at 313. Therefore, to construct schools instead of hospitals would be constitutionally irrational since such a legislative choice would prefer the education of children to the health of the population.

The Constitution informs us when the government is forbidden to further its interests by obstructing the individual rights of its citizens; it does not inform us which of its various legitimate interests the government must advance through the use of public funds. The latter function has been assigned by the Constitution to the Congress and to the democratic process:

> The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Dandridge v. *Williams*, 397 U.S. at 487.

Underlying the lower court's usurpation of the legislative power is the notion that Congress is constitutionally required to adopt a posture of "neutrality" toward private decisions to use any form of medical treatment a physician may recommend for a pregnant woman, so that the government must provide funds for *any* solution the physician offers to remedy a pregnancy related complication. Slip op. at 327. The State may not encourage one course of conduct over any other because this would upset the "mathematical nicety" which this ideology demands.

But abortion and childbearing are not merely two sides of the same coin. That view finds no support in our tradi-

tion,[17] and it is not imposed by the Constitution. "A woman has *at least* an equal right to choose to carry her fetus to term as to choose to abort it. Indeed, the right of procreation without state interference has long been recog-

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[17] Federal efforts to support the health needs of pregnant women and their children before and immediately after birth date as far back as 1912, more than fifty years before the advent of Medicare and Medicaid.

Congress established the Children's Bureau in 1912. Pub. L. No. 116, 37 Stat. 79 (1912). The Bureau's purpose was to investigate the social and economic conditions of children. K. Davis & C. Schoen, *Health and the War on Poverty: A Ten-Year Appraisal* (1978). As a result of this study, and in an effort to reduce infant mortality, the Bureau published a series of pamphlets on the care of children, beginning with prenatal care. Lathrop, *The Federal Children's Bureau: Some Aspects of Its Present Work*, 20 Case and Comment 176 (1929). In response to the increase in maternal and infant mortality reported by the Children's Bureau in 1919, the "Sheppard-Towner Bill" was proposed to promote the welfare and hygiene of infants before and after birth, regardless of the income status of their parents. Davis & Schoen, *supra* at 122.

Protection of infant health was also recognized by many states. Thirty-five already had departments of child health or welfare in 1919. Boldt, *A National Program for Maternity Aid*, 11 Am. Lab. Leg. Rev. 61 (1921). In 1920, the Massachusetts legislature organized a commission to study childbirth and recommended protective legislation. Beard, *Progress Toward Maternity Benefits in Massachusetts*, 11 Am. Lab. Leg. Rev. 66 (1921). The commission emphasized the importance of prenatal, obstetric, and postnatal nursing visits for *all* pregnant women. *Id.* The State of New York mailed pamphlets on prenatal care and childbirth to all newlyweds. Sobel, *Need for Protecting Maternity and Infancy*, 11 Am. Lab. Leg. Rev. 74 (1921).

The Sheppard-Tower Bill was passed by Congress in 1921, creating the Board of Maternity and Infant Hygiene. The stated purpose of the Act was to "promote the welfare and hygiene of maternity and infancy." Maternity and Infancy Act of 1921, Pub. L. No. 135, 42 Stat. 224 (1921). Some states passed enabling legislation immedi-

(footnote continued)

nized as 'one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.' *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942)." *Maher*

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ately, and all but five states followed. Davie, *The Open Door to Maternity Protection,* 11 Am. Lab. Leg. Rev. 311 (1921).

Maternal and child health services were incorporated in Title V of the Social Security Act in 1935, under administration of the Children's Bureau. Davis & Schoen, *supra,* at 122. The stated purpose of the Act was to "(enable) each State to extend and improve, as far as practicable under the conditions in such State, services for promoting the health of mothers and children. . . ." Social Security Act of 1935, ch. 531, Title V, §505, 49 Stat. 629 (1935). The national interest in childbirth and concern for maternal and infant health is evident from the fact that within nine months all states were participating in the program. Davis & Schoen, *supra,* at 123.

During World War II, Congress appropriated emergency funds for maternity and infant care for wives and babies of the lowest paid servicemen. *Id.* The 1963 amendment to Title V was designed to provide adequate prenatal care to lower the risk of mental retardation and infant mortality. *Id.* at 124. It appropriated funds for maternity and infant care projects aimed at reaching women early in pregnancy, continuing through childbirth and the postpartum period. Morehead, *Comparisons Between OEO Neighborhood Health Centers and Other Health Care Providers of Ratings of the Quality of Health Care,* 61 Am. J. Publ. Health 1294 (1971).

A further amendment to Title V in 1967 broadened the maternity and infant care projects. 6 Welfare in Rev. 1 (1968). In approving the amendment, the Senate set out provisions to "improve programs relating to the health of mothers and children." S. Rep. No. 744, 90th Cong., 1st Sess. 1, 6, *reprinted in* 1967 *U.S. Code Cong & Ad. News* 2834, 2839. President Johnson spoke of the national interest in protecting childbirth, recommending that the project reduce the "handicapping conditions caused by complications associated with childbearing and help to reduce infant and maternal mortality." 6 Welfare in Rev. at 31.

None of these programs contemplated abortion as a solution to maternal health problems; all were directed at preserving the life and health of the infant, before and after birth, together with the mother's health.

v. *Roe,* 432 U.S. at 472 n.7. The same can hardly be said of abortion.

The district court erred by attributing to this Court's prior decisions involving the scope of the right to privacy in the content of criminal legislation the principle that the State may not, when alloting public funds, assert an interest in the protection of fetal life when its interest in maternal health is present. It erred in finding that the Hyde Amendment creates a conflict between the government's interest in maternal health and its interest in the fetus. It erred in arrogating to itself the power to override the balance of legitimate state interests struck by the Hyde Amendment.

"This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the . . . distribution of economic benefits." *Idaho Dept. of Employment* v. *Smith,* 424 U.S. 100, 101 (1977). It should do so again; it should reverse the district court.

V.

LIMITATION OF ABORTION FUNDING IS VALID UNDER TITLE XIX

This section deals with the technical aspects of the Medicaid Act and its administrative regulations, state obligations under this Act and congressional intentions concerning medicaid and the funding of abortions. Of paramount importance, however, is that every time Congress has dealt with the question of funding abortion, it has clearly and without equivocation expressed its view that:

1) abortions except under limited circumstances shall not be funded or supported with federal funds, and

2) that the States are free, pursuant to their democratic processes, to decide not to fund abortions.

Also of paramount importance, and not to be forgotten, is that abortion was criminal at the time of the passage of the Medicaid Act and that there has never been an Act of Congress which explicitly or implicitly suggested a congressional intent to fund abortion, except under certain limited circumstances as set forth in the Hyde Amendment. (Indeed, the only congressional decision to fund any abortions at all were expressed in the language of the various Hyde Amendments.) Congress has consistently expressed a contrary intention, by repeatedly voting against funding abortions.

Title XIX is legislation intended to *enable* the several States to provide medical care for indigents, as the statement of the Title's intent makes clear. 42 U.S.C. §1396 (1976). It is not intended to "drive the state legislatures under the whip of economic pressure." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 587 (1937). The operation of the Title is "not constraint, but the creation of a larger freedom, the states and the nation joining in a cooperative endeavor to avert a common evil." *Id.* The purpose of the Social Security Act as a whole is to encourage the States to provide funding for services by providing federal funds when services are funded. *Id.* at 588. To hold that the Title requires the States to encourage conduct contrary to their interest in the fetus, especially when the federal government in agreement with that interest has specifically refused to provide funds for an activity which undermines that state interest, would pervert the intent of this program of cooperative federalism. "The Social Security Act is an attempt to find a method by which all these [federal and state] public agencies may work together to a common end." *Steward Machine Co.* v. *Davis*, 301 U.S. at 588.

It is vital to remember throughout that what transcends the technicalities is the requirement of faithfulness to

public policy and the intent of the legislature, which—as consistently articulated by the Congress—are unquestionably opposed to funding all but a small number of specified abortions.

A. This Court's Holding in Beal that States May Specify What They Will Fund in Their Medicaid Plans So Long as Such Specifications Are Reasonable and Consistent With the Objectives of the Act Was and Is Correct

In ruling that the mandatory standard the Medicaid Title establishes for the inclusion of services in each state plan is that all "medically necessary" services must be covered, slip op. at 294-5, the lower court directly contravened the explicit holding of this Court in *Beal* v. *Doe*, 432 U.S. 438, 444 (1977):

> [N]othing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care. . . . [T]he statute . . . confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be "reasonable" and "consistent with the objectives" of the Act.

The first issue, therefore, is whether *Beal* should be reversed insofar as it establishes the standard for analyzing the validity of state scope of benefit determinations, and replaced with a standard which demands that the States must cover any and all services which a physician states are "medically necessary" within the five mandatory categories. This question is treated in this section, A.

Assuming that the *Beal* standard is not reversed, the second issue is whether the Hyde Amendment limitations on abortion funding are "reasonable" and "consistent

with the objectives'' of the Act. This question is treated in B.

In the alternative, assuming that the *Beal* standard is replaced with a ''medical necessity'' standard, the third issue is whether abortion is unique in a manner which permits special funding limitations concerning it. This question is treated in C.

''The Court has stated repeatedly of late that in any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself.'' *Lewis* v. *United States,* 48 U.S.L.W. 4205, 4207 (1980). The court below cites 42 U.S.C. § 1396a(17) (1976) for the proposition that ''the state plans of medical assistance must include reasonable standards for determining eligibility—need—and the extent of medical assistance—necessary medical care.'' Slip op. at 294. This is flatly wrong. §1396a(17) contains no reference to ''necessary medical care'' or its equivalent. It states, ''A state plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this Title. . . .'' The material here omitted (as indicated by the ellipses) relates to specifications relevant only to eligibility standards; even among those, there is no reference to ''necessary medical care,'' ''necessary medical services,'' or the like, anywhere in §1396a(17).

1. No Requirement to Fund "Medically Necessary" Services Is Expressed in the Act

There are only two references to ''necessary medical services'' in the entire Title. One is in the Preamble to Title XIX, the medicaid section of the Social Security Act, 42 U.S.C. §1396 (1970), which states the general intent of Congress:

> [F]or the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services . . . there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter.

The stated general purpose of medicaid is thus to provide ''medical assistance'' to those who cannot afford ''necessary medical services.'' As is appropriate to a Preamble, it does not detail the nature or extent of the ''medical assistance'' to be provided: that is left to the substantive provisions of the Title. The Preamble does not require that all ''medically necessary'' services be funded. The phrase ''necessary medical services'' does not refer to the nature of the medical assistance to be provided under medicaid, but is merely used as an element in the general description of the class of individuals to whom the assistance is to be provided.

It is vital to recognize the difference between provisions in the Title relating to eligibility for benefits and those dealing with the extent of benefits. The eligibility provisions determine who can receive assistance; the extent of benefits provisions determine what it is they can receive. The two are wholly separate questions, and regulations or portions of the Title designed to deal with one of these aspects must not be mistakenly construed to set standards for the other.

It is apparent on the face of the statute that the phrase ''necessary medical services'' of the Preamble deals with *who* the Title affects (people unable to afford necessary medical services) and not with *what* the Title is to provide them. To designate what services are to be provided, the

text of the Preamble employs the more open-ended term "medical assistance."

In *Pre-term* v. *Dukakis,* 591 F.2d 121, 124 (1st Cir. 1979), the First Circuit noted, "It does not seem . . . that the words 'necessary medical services' are properly read as a substantive requirement imposed on the states. Instead this section merely specifies for whose benefit federal funds are to be appropriated—those 'individuals, whose income and resources are insufficient to meet the costs of necessary medical services.' " Earlier, the Second Circuit had drawn the same conclusion:

> [T]he phrase ["medically necessary services"] is used to describe persons eligible for "medical assistance" as those who are "unable to meet the costs of necessary medical * * * services." Sections 1396 and 1396a(10)(C)(i). As the opinion below points out, 380 F.Supp. [726], 728-729, the phrase appears in Title XIX
>
> "only as a limitation of *persons* eligible for Medicaid payments. * * * [T]he assistance to be made available to those who are eligible is always described simply as 'medical assistance' without the adjective 'necessary.' *See, e.g.,* 42 U.S.C. §§1396, 1396a(a), 1396a(a)(10). In particular, the detailed statutory definition of 'medical assistance,' 42 U.S.C. §1396d, contains no reference to medical necessity * * *."
>
> The broad classifications of the types of care and services authorized by §1396d do not include a "medical necessity" requirement. . . . We find no such requirement elsewhere in the statute.

Roe v. *Norton,* 522 F.2d 928, 933 (2d Cir. 1975) (emphasis in original).

In 1978, this Court handed down an opinion highly instructive about the breadth of state discretion in a similar program of "cooperative federalism." *Quern* v. *Manley,* 436 U.S. 725 (1978). The case concerned Title IV-A of the Social Security Act, which contains broad language authorizing wide eligibility for the Emergency Assistance Program. Illinois had implemented an emergency assistance program in which the eligibility requirements were defined significantly more narrowly than in the federal act. This Court, in an opinion by Mr. Justice Stewart, held that these limitations were within the reasonable discretion of the State.

The opinion contrasted the Emergency Assistance Program with that for Aid to Families with Dependent Children (AFDC), noting that they had parallel statutory provisions ("needy child" and "dependent child") that described eligible persons "in terms of definition of the program for which federal funding is available." *Id.* at 743 n.18. While the AFDC reference to "dependent child" was later defined specifically in the statute, the emergency assistance term "needy child" was not. Thus, this Court held, Congress intended the AFDC language (but *not* the Emergency Assistance language) to be binding in its breadth upon the State. *Id.* at 743.

The parallel to §1396 of Title XIX is remarkable. Describing eligible persons as those in need of "necessary medical services," §1396 defines the "program for which federal funding is available." Like the Emergency Program (and unlike AFDC) the key term ("necessary medical services") is *not* later defined in the statute. Thus, "necessary medical services" in Title XIX (like "needy child" in the Emergency Assistance Program) is not "statutory language . . . that can reasonably be understood as imposing uniform standards. . . on every state program."

Apart from the Preamble's reference to "necessary medical services," there is only one other reference to "neces-

sary medical services'' in the entire Title. It is 42 U.S.C. §1396a(a)(10)(C)(i)(1976), which requires that ''if medical assistance is included for any group of individuals'' other than those already receiving specified forms of public assistance, then the state plan must provide ''for making medical assistance available to all individuals who [among other specified qualifications] have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services. . . .''

This section explicitly relates to eligibility statutes. Later portions of the section, not quoted, refer to the ''amount, duration and scope'' of medical assistance only to assure that services which are made available to some specified classes are made available on the same basis to other specified classes. Eligibility as a medicaid recipient does not ensure an individual's receipt of all benefits. *Compare Rosado* v. *Wyman,* 397 U.S. 397 (1970), *with Dandridge* v. *Williams,* 397 U.S. 471, *reh. denied,* 398 U.S. 914 (1970), and *Quern* v. *Manley.*

2. The Statute Requires that "Part," But Not All, of the Services in Each Mandated Category Be Funded

The care and services required under the state plan are specified by 42 U.S.C. §1396a(13) (1976), which states that a state plan should provide:

''(A) for the inclusion of some institutional and some non-institutional care and services,'' for home health care for those entitled to nursing care,

(B) with regard to the categorically needy, ''for the inclusion of at least the care and services listed in clauses (1) through (5) of section 1905(a) [42 U.S.C. §1396d(a)],

(C) with regard to the ''medically needy,'' if they are covered, ''for the inclusion of at least'' such services, or alternatively, ''the care and services listed'' in any 7 of the clauses numbered (1) through (16) of such section and specified physicians' services in hospitals or nursing facilities ''in the event the care and services provided under the State plan include hospital or skilled nursing facility services,''

(D) for the payment of the reasonable cost ''of inpatient hospital services provided under the plan,''

(E) for the payment of the reasonable cost ''of the skilled nursing facility and intermediate care facility services provided under the plan,'' and

(F) for the payment of the reasonable cost of specified services ''provided by a rural health clinic under the plan.''

42 U.S.C. §1396d(a) (1976) defines ''medical assistance'' as follows:

''(a) The term 'medical assistance' means payment of *part* or all of the cost of the following care and services . . . for individuals . . . whose income and resources are insufficient to meet all of such cost—

(1) inpatient hospital services. . . ;

(2) outpatient hospital services;

(3) other laboratory and x-ray services;

(4) (A) skilled nursing facility services. . .

(B) early and periodic screening and diagnoses. . .

(C) family planning services. . . ;

(5) physicians' services;''

(Emphasis added.)

Twelve other categories are also listed.

It is clear either that the provision that the state plan for medical assistance need pay for only "part . . . of the cost of the following care and services," means that this Court's holding in *Beal*, 432 U.S. at 444, that "nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of care" is correct, or that the language "part or all" must somehow be construed not to apply to the extent of medical services within the five delineated categories.

It might be construed to apply only to the medically needy, for whom some categories of services are optional for the States, and who are expected to pay part of the costs of their medical care to the extent their income and resources allow. But this view ignores the fact that the language in question must have been intended to apply equally with reference to the categorically needy (for whom no such cost-sharing applies) since immediately following it in the same sentence there is a qualification specified to apply to the medically needy:

> (a) The term "medical assistance" means payment of part or all of the cost of the following care and services . . . for individuals, and, with respect to physicians' or dentists' services, at the option of the State, to individuals [who are medically needy].

Had the Congress meant the "part or all" language to apply only to cost-sharing with the medically needy, it might have drafted the language to read:

> The term "medical assistance" means *payment of the cost of the following care and services* . . . for individuals, and *payment of part or all of the cost of the following care and services* (and with respect to physicians' or dentists' services, at the option of the State) to individuals [who are medically needy].

But Congress did not.

This observation is substantiated by the fact that §1396a (a)(13)(A)(i)(1976), requiring the state plan to provide "for the inclusion of some institutional and some non-institutional care and services" would be utterly superfluous if the States were already required to fund everything within the five delineated categories. Prior to 1967, the section read:

> (13) provide for inclusion of some institutional and some non-institutional care and services, and, effective July 1, 1967, provide (A) for inclusion of at least the care and services listed in clauses (1) through (5) of section 1905(a), and (B) for payment of the reasonable cost (as determined in accordance with standards approved by the Secretary and included in the plan) of inpatient hospital services provided under the plan.

Pub. L. 89-97, July 30, 1965, 79 Stat. 345-346 (amended 1968, Pub. L. 90-248, §224[a]).

This might plausibly give rise to the impression that the requirement of providing some institutional and some non-institutional care was merely a transitional requirement to be outmoded when the requirement to include the five delineated categories came into effect in 1967. However, when Congress amended the Act to include (B) it maintained in the Act what is now (A)(i).

The phrasing of the required categories themselves makes it unlikely that Congress meant that every "medically necessary" item within them must be funded. For example, 42 U.S.C. §1396d(a)(3)(1976) lists, as the full description of a category, "other laboratory and x-ray services." It does not say "*all* laboratory and x-ray services" or even "laboratory and x-ray services." It says, indefinitely, "other" such services.

This impression is strengthened by the way the Senate Finance Committee referred to this section in its Committee Report. After setting out the list of services "the first five of which the States are required to include in their plans, if they elect to implement Title XIX," the report adds, in explanation of an amendment adding a sixth mandatory service, "The committee believed that *some* dental services should be required as to individuals under the age of 21," S. Rep. 404, 89th Cong., 1st Sess., 80 (emphasis added), and amended what would have become §1396d(a)(4) to read:

> (4) skilled nursing home services . . . for individuals 21 years of age or older and dental services for individuals under the age of 21.

Id. at 521.

The addition of dental services as a mandated category did not survive the conference between managers for the House and the Senate, Conf. Rep. No. 682, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. and Ad. News 2228, 2246-47, but what is significant is that the Senate Finance Committee evidently equated the broad statements of each required service category with a requirement that the state plans include "some," but not necessarily all, services in that category.

3. The General Provisions of the Social Security Act and the Professional Standards Review Organization Sections Support a Construction of the Title Which Accords Discretion to the States Concerning Coverage Determinations

All parts of a law should be considered and construed together. *Boys Markets, Inc.* v. *Retail Clerk's Union Local* 770, 398 U.S. 235, 250 (1970). Implicitly, the lower court does this in stating that all "medically necessary" items

are covered—and not "all" services within the mandated categories. If "medically necessary" can be conceived to qualify the "include at least language" by putting a ceiling on what must be included, there is no basis for rejecting the holding in *Beal* that 42 U.S.C. §1396a(a)(17)(1976) similarly qualifies the general requirement of providing services in the five mandated broad categories when it empowers States to establish "reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]." *Beal* v. *Doe,* 432 U.S. at 441.

It is true that the bulk of the detailed specifics in 42 U.S.C. §1396a(a)(17) relate to eligibility for services, rather than the extent of services. Nevertheless, the statute is explicit in including "the extent of medical assistance under the plan" as something for which the States can set "reasonable standards." It is a fundamental canon of statutory construction that, whenever possible, effect must be given to every word of a statute. *FAA Administrator* v. *Robertson,* 422 U.S. 255, 261 (1975).

Each section of a statute should be construed in connection with the rest of its sections. It is improper to confine attention to the section being construed. *Kokoszka* v. *Belford,* 417 U.S. 642, 650 (1974). From this perspective, Subchapter XI of the Social Security Act strongly advances the argument that Congress has not imposed a "medical necessity" requirement upon the States through Title XIX.

Part A of Subchapter XI contains general provisions regarding Social Security programs (including Title XIX) which date back to 1965 and earlier, while Part B, 42 U.S.C. §1320c *et seq.* (1976), entitled "Professional Standards Review" (creating Professional Standards Review Organizations, "PSROs") is a recent addition to the Act. 42

U.S.C. §1320c *et seq.* (1976) (as amended 1972 Pub. L. 92-603, Title II, §249F[b], 86 Stat. 1430).

In 42 U.S.C. §1312 (1976) (Part A of Subchapter XI) Congress recognized that the question of service coverage rests primarily with the States, not with medical providers or practitioners. That section provides, *inter alia*:

> *In order to assist the States to extend the scope and content* and improve the quality, of medical care and medical services for which payments are made to or on behalf of needy and low-income individuals . . . the Secretary shall develop . . . guides or recommended standards as to the *level, content, and quality of medical care and medical services* for the use of the States in evaluating and improving their public assistance medical care programs and their programs of medical assistance, shall secure periodic reports for the States on items included in, and the quality of, medical care and services for which expenditures under such program are made.

(Emphasis added).

If Title XIX were intended to require the states to fund all "medically necessary" procedures, there would be no need for Congress or the Secretary to "assist the states to *extend* the scope and content" of their Title XIX programs. Neither the Secretary nor the States would be concerned about "standards as to the level, content and quality of medical care and services" for there would be only one uniform, unvarying standard applicable to all the States: unlimited professional discretion. Under such a standard, medical care and services would be provided in accord with a provider's professional judgment, whenever and to the extent "necessary," "in light of *all* factors affecting" a patient's health, as understood by each of the hundreds of thousands of health care providers in the United States—each doctor, dentist, pharmacist, chiropractor, physical therapist, hospital, skilled/intermediate

nursing facility, clinical laboratory, ambulance service, and any other recognized health care provider. The federal government and the States would simply pay the bill. But such a standard would render the provision of §1312 meaningless, or at best, superfluous.

It cannot be argued that the section applies only to the extension of benefits to the optionally covered "medically needy," since it refers both to the "needy" and to "low-income individuals" (the categorically needy).

The objectives of Congress with respect to the 1972 Part B amendments to Subchapter XI related to "the establishment of Professional Standards Review Organizations [PSROs] consisting of substantial numbers of practicing physicians . . . to assume responsibility for comprehensive and ongoing *review of services covered* under the medicare and medicaid programs." H.R. Rep. No. 231, 92nd Cong., 2nd Sess. 1 (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News, 4989, 5391-92 (emphasis added). When Congress amended the PSRO provisions in 1977, P. L. 95-142, the legislative history of those amendments clearly discloses it was intended that PSRO legislation "would not affect other provisions of existing law relating to determinations with respect to conditions for eligibility to or payments of benefits." H.R. Rep. No. 393, 95th Cong., 1st Sess. 1, 55 *reprinted in* 1977 U.S. Code Cong. & Ad. News, 3039, 3058. PSROs have no jurisdiction whatever over issues of coverage or scope of benefits. *See* 42 C.F.R. §463.18 (1979).

The actual role of the PSRO is set forth in 42 U.S.C. §1320c and its implementing regulations. The statute itself reads:

> In order to promote the effective, efficient, and economical delivery of health care services of proper

quality for which payment may be made (in whole or in part) under this chapter and in recognition of the interests of patients, the public, practitioners, and providers in improved health care services, it is the purpose of this part to assure, through the application of suitable procedures of professional standards review, that the services for which payment may be made under this chapter will conform to appropriate professional standards for the provision of health care and that payment for such services will be made—

> (1) only when, and to the extent, medically necessary, as determined in the exercise of reasonable limits of professional discretion; and
>
> (2) in the case of services provided by a hospital or other health care facility on an inpatient basis, only when and for such period as such services cannot, consistent with professionally recognized health care standards, effectively be provided on an outpatient basis or more economically in an inpatient health care facility of a different type, as determined in the exercise of reasonable limits of professional discretion.

42 C.F.R. §463.27(c)(3) (1979) provides that "PSRO determinations shall not preclude appropriate coverage determinations under the provisions of Title XIX of the Act with regard to issues that are not subject to PSRO determination." HEW further explains that:

> [s]ections 463.26(c) and 463.27(c) make clear that the Department under Title XVIII and the States under Title XIX may establish the services that are covered on a uniform basis (scope of benefits). However, to the extent *individual* medical judgments are required to *implement these coverage rules,* it is the PSRO's responsibility and authority to make these medical judgments which must be followed by the Medicare fiscal agents and State Medicaid agencies.

43 F.R. 7406 (February 22, 1978) (emphasis added).

The PSRO's function is to undertake the case by case review of individual requests for reimbursements and to ensure that no treatment which is not medically necessary is reimbursed.

Far from substantiating the wide physician discretion considered by the lower court to be mandated by Title XIX, the establishment of PSROs manifest legislative intent to curtail the unchecked exercise of such discretion. "It was," in the words of HEW, "because the Medicare fiscal agents and State Medicaid agencies were determined not to be performing effective utilization review by Congress that the Congress instituted the PSRO concept. . . ." 43 F.R. 7406 (February 22, 1978). Indeed, the law enacting the relevant provisions was entitled "Medicare-Medicaid Antifraud and Abuse Amendments." Act of Oct. 25, 1977, Pub. L. No. 95-142 (to be codified in 42 U.S.C. §1305).

The *Bolton* definition of "medical necessity"—which states that the attending physician alone may determine whether precedures are medically indicated—is therefore utterly inconsistent with the manner in which utilization review is actually conducted under the Title. PSROs, not attending physicians, determine whether practices are "medically necessary."[18] States, not PSROs, determine the extent of coverage under Title XIX.

"Medical necessity" in the context of the review of and the setting of standards for individual medical judgments takes on a substantially different connotation than it does in the context of making scope of benefit coverage decisions with regard to such items as abortion and transsexual

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[18] The PSRO statute was upheld against constitutional attack for interfering with the "privacy of the physician-patient relationship" in *American Assn. of Physicians and Surgeons* v. *Weinberger,* 395 F.Supp. 125 (N.D. Ill. 1975), *aff'd,* 423 U.S. 915 (1976).

surgery. In general, one needs medical care because one has a health problem: a specific illness or disease. A patient or prospective patient normally shuns any treatment, especially surgery, unless told it is required. In such cases, the primary concern is that the physician will *over-treat*—that he will because of caution, ignorance, or simple greed, employ more treatment methods than are really necessary to deal with the health problem, or employ treatment methods which are less cost-efficient than equally efficacious alternatives. Normally, medical professionals are best equipped to make such judgments, and thus mechanisms like the PSROs can provide an effective check.

For the coverage decisions concerning items like abortion, however, the context is different. In such cases, surgery is frequently sought for social or personal reasons. Here, the primary concern is that physicians can easily bring such reasons under the umbrella of "health problems" by regarding as "medically necessary" whatever may in their view contribute to "the well-being of the patient"—*e.g.*, prevent her from having too large a family, or avert "psychological harm" from being pregnant out of wedlock. Unlike a judgment whether drug X or drug Y most effectively and economically treats glaucoma, there is nothing inherently medical in such determinations. PSROs are equipped to judge the efficacy of treatments, and can easily weigh them against an immediate fiscal standard. They have no special expertise to weigh into the balance such factors as the state's interest in preserving fetal life.

Indeed, the nature of the PSRO "medical necessity" determination which the Act sets as a ceiling for coverage must be viewed as having a different nature than the sort of "medical necessity" determination the lower court considers to serve as a floor for coverage. This is indicated

by the fact that 42 U.S.C. §1320c clearly precludes payment for services which are not certifiably "medically necessary." But *Beal* emphasized that States which choose to do so can include "medically *un*necessary" abortions in the scope of their coverage. *Beal* v. *Doe,* 432 U.S. at 447 n. 11. These two legal effects can be understood as consistent only by recognizing that, as the First Circuit noted, there are "two levels of judgment as to medical necessity in the statutory scheme. The first is the macro-decision by the legislature that only certain kinds of medical assistance are deemed sufficiently necessary to come under the coverage of its plan. The second is the micro-decision of the physician, that the condition of his patient warrants the administering of a type of medical assistance which that plan makes available." *Preterm* v. *Dukakis,* 591 F.2d at 125. It is this second "micro-decision" which is subject to PSRO control. In the "micro" sphere, the fairly technical determination by the PSRO whether a given treatment is "medically necessary," in the sense of most efficient, is normally binding on both the physician provider and on the state medicaid agency. But in the "macro" sphere, the State has latitude to fund medically unnecessary items or to refrain from funding some items which might be deemed "medically necessary," provided only that it does so reasonably and consistently with the objectives of the Act.

As the House Committee on Ways and Means stated in its report on the "Medicare-Medicaid Antifraud and Anti-abuse Amendments," the pertinent parts of which are now law, "[W]here a . . . PSRO has been found competent by the Secretary to assume specific review responsibilities and is performing such reviews, a determination as to quality or necessity made in connection with such review would constitute the conclusive determination on those is-

sues for purposes of payment. . . . State medicaid agencies would continue to be responsible for other types of reviews and determinations relating to program eligibility, coverage of services, audit, claims payment, fraud and abuse detection, and related activities." H.R. Rep. No. 393, 95th Cong., 1st Sess. 1, 54 (1977).

4. The Implementing Regulation Legitimizes A State Choice to Limit Funding of Abortions

The Secretary of HEW has promulgated regulations which are consistent with the intentions of Congress and the purposes of medicaid.[19]

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[19] Recently, through the device of a footnote in a brief (Brief for the United States, *Williams* v. *Zbaraz*, No. 79-4, p. 43 n.23), the Secretary has apparently changed HEW's longstanding interpretation to maintain that "medically necessary" care falling within "the five mandated" categories must be funded by the States, including "mediately necessary" abortions.

Prior to this change, HEW did not interpret the Title to require that all "medically necessary" procedures be funded. *See Rush* v. *Parham*, 440 F.Supp. 383, 387 (N.D. Ga. 1977), *appeal pending*, and *Virginia Hospital Ass'n* v. *Kenley*, 427 F.Supp. 781, 785-786 (E.D. Pa. 1977). HEW approves state plans which restrict abortion funding in accord with a standard short of "medical necessity." [See Appendices A through N, Affidavits filed with Brief in Behalf of William A. Lynch, M.D., et al., Amici Curiae, in *Pre-term, Inc.* v. *Dukakis*, No. 78-1324. *Parents' Aid Society, Inc.* v. *Sharp*, No. 78-1325, No. 78-1326 (consolidated cases), (1st Cir., brief filed Oct. 1978)]. The approved plans for Kansas (Appx. C), Louisiana (Appx. D), New Mexico (Appx. G), North Carolina (Appx. H) and Virginia (Appx. M) in substance limit payment for medicaid abortions services to life-threatening abortions. The variety of approved plans demonstrates the freedom accorded the States in this regard. It has long been held by this Court that great weight will be given to a *consistent* construction of a statute by the agency

(footnote continued)

HEW's regulation implementing 42 U.S.C. §1396(a)(17) is 42 C.F.R. §440.230 (1979):

> (a) The plan must specify the amount and duration of each service that it provides.

(footnote continued)

charged with its administration. *Five Per Cent Cases*, 110 U.S. 471, 484-485 (1884).

During its consideration of the Hyde Amendment, Congress relied on HEW's construction of Title XIX as allowing States to restrict abortion funding, and emphasized that it was never the intent of Congress to force the States to fund abortions. *See, e.g.*, statement of Representative Donnelly, 125 Cong. Rec. H. 9885 (daily ed. Oct. 30, 1979). Furthermore, by adopting the Hyde Amendment, the Congress acted to ratify HEW's construction of Title XIX by adopting restrictive standards for federal abortion funding. This is not a case of mere legislative inaction being interpreted as acquiescence in the interpretaion of the agency. *United States* v. *Jackson*, 280 U.S. 183 (1930). Rather, this is a case where Congress has specifically considered the construction under question, has refused to alter that construction, and has ratified it with parallel controls on the federal treasury. Under similar circumstances, where Congress has re-enacted a statute without changes, this Court has held that "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell-Aerospace*, 416 U.S. at 267, 275 (1974).

Given these circumstances of a consistent administrative construction that has been subsequently ratified by Congress, the Secretary's new order is bereft of the deference given the previous constructions. This Court has consistently given little weight to administrative constructions which have not been uniform or consistent. *Federal Maritime Bd.* v. *Isbrandten Co.*, 356 U.S. 481, 499-500 (1958).

While departmental construction of enabling language is entitled to great deference, such construction "is only one input in the interpretational equation." *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969). This Court must not "abdicate its ultimate responsibility to construe the language employed by Congress," *Id.* at 193, particularly "where

(footnote continued)

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c) (1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§440.210 and 440.250 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

Three observations should be noted with respect to this regulation. *First,* this regulation conforms to the basic principle of broad state discretion in specifying the extent of medical assistance which the state will provide under its medicaid plan.[20] Discretion is the predicate of the regulation; it is then limited in certain specified ways. To infer limitations on state discretion which are not specified would be to violate the clear intent of the regulation.

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there are compelling indications that [the administrative construction] is wrong." *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973); *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 381 (1969):

> [T]he courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374-375, and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional purpose underlying a statute." *NLRB* v. *Brown*, 380 U.S. 278, 291, *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968).

[20] Of course, if a given item of medical assistance (*e.g.*, "medically necessary" abortion) is made available in a particular amount, duration, and scope to any individual or individuals, it must be made equally available to all other individuals similarly situated in terms of eligibility and need. 42 U.S.C. §1396a(a)(10) [1974].

Second, by explicitly recognizing the right of the State to regulate on the basis of criteria relating to "medical necessity," the regulation plainly authorizes the States to make judgments about the *degree* of medical necessity in any given procedure (*e.g.*, that abortions to preserve life are "necessary" whereas "health" abortions are not), a fact which unquestionably forecloses claims that such determinations must be left to the discretion of physicians.

Third, the regulation asserts state agencies "may not deny or reduce the . . . scope of a required service . . . *solely* because of the diagnosis, type of illness, or condition." (Emphasis added.) But a State's choice not to fund "health" abortion is not based "*solely*" on any excluded ground. Indeed, state action based on such interests is not based on "the diagnosis, type of illness or condition" *at all.* It is based on the States' "important and legitimate interests . . . in protecting the potentiality of human life" *Roe* v. *Wade,* 410 U.S. at 162; *Beal* v. *Doe,* 432 U.S. at 445-446. Such action merely refuses to fund one alternative response—one *treatment*[21]—of some complica-

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[21] 42 C.F.R. §440.130(a) (1979) defines "diagnostic services" as "any medical procedures or supplies recommended by a physician or other licensed practioner of the healing arts, within the scope of his practice under state law, to enable him *to identify the existence, nature, or extent of illness, injury, or other health deviation* in a recipient." (Emphasis added.) Diagnosis deals with the nature of the illness, not with the nature of the care with which a physician chooses to treat that illness.

Therefore, a State's choice to restrict funding for abortions not necessary to preserve maternal life, when it funds all alternative treatments and when those treatments fully meet the genuine needs associated with pregnancy complications, as here, does not reduce the "amount, duration and scope . . . because of the diagnosis." It is even more obvious that it does not do so "because of the . . . type of illness or condition."

tions of pregnancy on behalf of an independent valid interest in the fetus.

Thus, neither the Title nor its implementing regulations imply that the State must fund all "medically necessary" procedures. The States might properly regard funding of "medically necessary" abortion as "unreasonable" or "impracticable." They must fund "medical assistance," but only in "part." A restriction upon "medically necessary" abortion funding is not based "solely" upon diagnosis, type of illness or condition. Hence, the States may refuse to fund "medically necessary" abortion under the plain language of Title XIX.

Because a careful analysis of the statute reconfirms the validity of the *Beal* framework for analyzing the Medicaid Title, this Court should reject the lower court's ruling that the Act requires the States to fund all items within the five mandated categories which any physician calls "medically necessary," and it should reaffirm the principle that the Medicaid Title "confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." *Beal* v. *Doe*, 432 U.S. at 444.

B. The Standards Established by the Hyde Amendment Are Reasonable and Consistent with the Objectives of the Act

1. The State's Interest in Fetal Life Is Consistent With the Objectives of the Act

It is striking that, despite the clear and explicit holding of this Court in *Beal* (432 U.S. at 446) that "nothing in either the language or the legislative history of Title XIX . . . suggests that it is unreasonable for a participating State to further [its] unquestionably strong and legitimate

interest in encouraging normal childbirth,"[22] not a single court which held abortion funding limitations to be inconsistent with the Act so much as mentioned this state interest in discussing the statutory validity of the limitations.[23]

An important distinction must be made. If an interest exists which is not inconsistent with the objectives of the Act, it exists regardless of the presence or importance of other countervailing interests or circumstances. Those other considerations may affect the weight that can or ought to be given to an interest, but they cannot affect the intrinsic validity of the interest itself. Nor can they, by their presence, transform an interest which is not inconsistent with the Act's objectives into one which is inconsistent. Thus, if the state's interest in fetal life is consistent with the objectives of the Act in the context of deciding whether or not to fund abortions which are openly denominated as elective, it is no less consistent with those objectives in the context of deciding whether or not to fund abortions which are desired by an indigent woman and which are then under the lower court's ruling "medically necessary."

The central error of the various lower courts which have dealt with the statutory issues has been to assess the abortion funding limitations as if their sole purpose was to pursue short-term fiscal frugality by rationing abortion-

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[22] *See* this Brief at 57 n.14, concerning the sophistic effort to discount "normal childbirth" as an applicable state interest by the lower court in analyzing the constitutional issues.

[23] Many of the courts have discussed the state interest in fetal life in their constitutional analysis, but only *D.R.* v. *Mitchell*, 456 F.Supp. 609 (D. Utah 1978), considers it in the context of statutory analysis. *Mitchell* upheld the abortion limitations.

related care to those in greatest need of it. The cases hold that Hyde Amendment type restrictions are an "unreasonable" means of attaining this end, which they recognize as legitimate within the confines of the Act. *See, e.g., Preterm* v. *Dukakis,* 591 F.2d at 125-127, 126 n.4 (1979).

The willingness of the courts to recognize fiscal frugality as an end makes doubly inappropriate their studied neglect of the interest in fetal life.

Fiscal frugality is of no value to the State in and of itself: the value of money is purely instrumental—dependent upon the importance of that which it might purchase. Thus, when the State anywhere chooses to limit its expenditures for medicaid, it does so based on its conviction that the money saved can better be employed elsewhere—for other programs or to relieve the tax burden. In short, a State determines its budgeting allocation to medicaid by balancing its interests in the health of its indigent citizens against other independent valid state interests. Thus, one cannot concede the propriety of a benefit limitation upon fiscal grounds without accepting the proposition that coverage decisions based upon independent valid state interests, such as in the protection of fetal life, are "consistent with the objectives of the Act."[24]

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[24] To substantiate its conclusion that the Hyde Amendment restrictions are inconsistent with the objectives of the Act the lower court (slip op. at 294) cites 42 U.S.C. §1396a(a)(19) (1974), which requires the state plan to establish safeguards to assure that in the administration of the plan individuals' eligibility is determined, and services are provided, in a manner "consistent with . . . the best interest of the recipients." It is evident on the face of this provision that it relates to the *manner* in which assistance is provided, and not to *what items* of assistance will be provided. In any case, the amorphous phrase "best interest of the recipients" is designed to provide a general objective in drawing up the plan and conceivably a

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2. The Abortion Funding Limitations Are Reasonable

If the Hyde Amendment restrictions are not "inconsistent with the objectives" of the Act, the remaining question is whether they are "reasonable standards."

"Reasonable" is an amorphous term. If it is equated with the constitutional "rational basis" test, under which the question is whether the legislation is a means which in fact advances a legitimate end,[25] the restrictions are unquestionably reasonable: given that the interest in fetal life is legitimate and consistent with the Act's objectives, the restrictions in fact tend to advance that interest.

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standard for HEW review, certainly not a license for courts to scrutinize every detail of each plan to arbitrarily declare which elements do, and which do not, accord with the court's own notion of what is in the "best interest" of recipients.

See S. Rep. No. 409, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Congressional and Administrative News, p. 2016-17. The Report makes it clear that Congress contemplated that the provision would apply to the *manner* in which services would be provided, and not that it would create a new substantive requirement relating to the *extent* of services provided under the state plan.

Similarly, 42 U.S.C. §1396a(a)(22)(D) (1974) and its implementing regulation, 42 C.F.R. §440.260 (1979), provide that state plans should include standards to assure that the care given under medicaid is of "high quality." Obviously, this deals with the *quality* of treatment in the items provided, and establishes no new standard to regulate the extent of medical assistance.

[25] In the words of Mr. Justice Stewart writing for the Court in *Richardson* v. *Belcher,* 404 U.S. 78, 84 (1971), "If the goals *sought* are legitimate, and the classification adopted is rationally related to the achievement of *these* goals, then the action of Congress is not . . . arbitrary. . . ." (Emphasis added.)

The court below found:

> The evidence supports the inference that an undetermined but substantial percentage of women denied medically necessary abortions under medicaid carry the fetuses to term. . . .

See also Right to Choose v. *Byrne,* 398 A.2d 587, 594 (N.J. Super. 1979) (during the period abortion funding limitations were in effect the number of births to medicaid-eligible women rose by 30%).

But if "reasonable" within the context of a statute means more than "rational" in the context of constitutional analysis—if it means that a reasonable person could conclude that the action was the result of a rational weighing of all the factors involved--the Hyde Amendment restrictions are still "reasonable."

The lower court opinion in this case demonstrates more candidly than most of the other lower court rulings that a "medically necessary" abortion is synonymous with an "elective" abortion. *See* this Brief at 15-18. If the government wishes to vindicate its interest in fetal life at all, it cannot fund all "medically necessary" abortions. How is it to avoid this?

It cannot rely on the physicians who perform abortions, in the same manner as it might, at least in the first instance, rely on them to make judgments concerning what treatment is appropriate in other areas of medical practice. Abortion is a most hotly debated and most polarizing issue. The battle lines are drawn, and abortion-performing physicians are, naturally, among the most committed of the protagonists on one side. The government could reasonably conclude that, in dealing with a group which not only does not share, but is fundamentally hostile to its interest in fetal life, it must establish limitations with particular care. It is important to emphasize that we are not talking here about physician fraud, something which arguably might

be dealt with by means other than the exclusion of an item particularly subject to fraud from coverage.[26] A physician who certified an "elective" abortion for reimbursement under the "medically necessary" standard as set forth by the lower court would not be committing fraud, but would be entirely within his rights. He would simply be acting in accordance with his sense of the woman's "well-being"—in the exceedingly broad sense encompassed by the *Bolton* standard—without taking into account the government's interest, which he may not share, in fetal life. Thus, the government would be forced to pay for the destruction of its own interest.

The government cannot rely on the PSROs. Their review and standard setting is related solely to efficacy and is not designed to take into account valid independent interests such as that in fetal life.

The only means available to the government to advance its interest in fetal life and to avoid paying for elective abortions is to set its own standards for coverage of abortions, providing qualifying language more specific than "medical necessity." In doing so, it must of course balance its interests in fetal life and in maternal health.

The lower court made the following finding of fact:

> The medical testimony was substantially in agreement that by the use of the most advanced present day medical techniques, and with close medical supervision, it was possible for women with life threatening conditions to survive pregnancy and bear children with a comparatively low ratio of maternal mortality; it

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[26] *But see Budnicki* v. *Beal,* 450 F.Supp. 546, 557 (1978), which, although it was dealing with an "optional" rather than a "mandated" service, held it to be reasonable for a State faced with abuse with regard to a particular covered item, to terminate coverage of that item (orthopedic shoes).

> was reasonably clear that the testimony rested on the assumption that the pregnant woman was desirous of bearing the child, and was cooperative throughout the pregnancy.

Slip op. at 90-91.

In other words, treatments alternative to abortion are available (except, as the opinion elsewhere makes clear, in crisis situations). The government is willing to pay for "advanced . . . techniques" and "close medical supervision." The only other factor is whether the woman, because she does not want the child, will refuse to cooperate with the treatment. Surely, it is not unreasonable for the government to decide that those who refuse to cooperate with treatment which will meet their needs, and thereby voluntarily harm themselves, need not be provided with other treatment which may diminish the need for cooperation but which will destroy the government's interest in fetal life.

Therefore, in view of the willingness of the government to provide alternative forms of treatment, it is reasonable for the government to consider that its interest in maternal health would not be significantly undermined by restrictions on funding for abortions. In weighing that conclusion together with the certainty that its interest in fetal life would be gravely impaired by funding of vast numbers of "medically necessary " including elective abortions, it was reasonable for the government to adopt abortion funding limitations.

C. Abortion is Unique in a Manner which Permits Special Funding Limits with Regard to It

Even were this Court to overturn *Beal* and determine that the general standard for the inclusion of items within the state plan must be "medical necessity" rather than

"reasonable standards . . . consistent with the objectives" of the Act,[27] the special nature of abortion would permit States to exclude it from the services provided under their plans.

Pregnancy itself is "significantly different from the typical covered disease or disability." *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 136 (1976). Abortion is unique. "The simple answer to the argument that similar requirements are not imposed for other medical procedure is that such procedures do not involve the termination of a potential human life." *Maher* v. *Roe,* 432 U.S. 464, 480 (1977).

As Mr. Justice Stewart wrote for the Court in *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis,* 100 S.Ct. 242, 247 (1979), "Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent." The clear attitude of the Congress of the United States, from the time of the adop-

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[27] Even were the Court to so conclude, it is important to note that the Medicaid Title would still create no general "statutory entitlement" to the medicaid eligible for all "medically necessary" care in any "comprehensive" sense. The Medicaid Title lists 17 broad categories of care within the general definition of "medical assistance" (42 U.S.C. §1396d(a) [1976]), only five of which are "mandated" categories (42 U.S.C. §1396a(a)(13)(B) [1976]); the rest are optional with the States. They include such items as "clinic services" [§1396d(9)(a)]. "prescribed drugs" [§1396d(a)(12)] and "diagnostic . . . services" [§1396d(a)(13)]. Since abortions are frequently performed in abortion clinics, since the cost of pregnancy test (a diagnostic service) is often included in the general abortion fee, and since some forms of abortions are either done through the means of, or with the assistance of, "proscribed drugs," affirmance of the lower court's injunction requiring the funding of all "medically necessary" abortions will often mean that abortions are paid for when other "medically necessary" care within the same categories is not.

tion of the Social Security Act's Medicaid Title up to the present, has been one which disfavors abortion. There has *never* been any indication that the Congress ever intended to force the States to fund abortions. Indeed, the contrary intent has been repeatedly expressed.

Traditionally, there are two conflicting philosophies concerning the role of those engaged in statutory construction. In one view, it is said that the court should seek to carry out the actual will of the legislature. To understand that will, resort should be had to extrinsic sources, such as legislative history and contemporaneous circumstances. *See, e.g.,* Landis, *A Note on "Statutory Interpretation",* 43 Harv. L. Rev. 886 (1930). In the other view, the court should focus on what the statute as written is most likely to convey to members of the general public who are bound by it. Frankfurter, *Some Reflections on the Reading of Statutes;* 47 Col. L. Rev. 527 (1947). Of course, the conflict between these two views is largely a matter of emphasis: no partisan of the former view would advocate ignoring the plain language of the statute; no partisan of the latter view would say that one could not consult contemporaneous usage to determine the meaning of an archaic word. But in determining how much emphasis to place on either view in a given instance, it is well to take account of the policies each serve.

The principal policy supporting the view which deemphasizes reference to extrinsic sources is that those bound by a statute should not have to guess at its meaning, or find its apparent implications altered by information not present in the statute books. It applies with greatest force to criminal statutes.

In the present case, however, the bills are directed primarily to governmental personnel administrators who are specialists in the field. Here, the concerns with regard to

fair warning and reliance are less appropriate than the concern which emphasizes carrying out the will of the legislature.

Title XIX, like all statutes, must "be construed with reference to the circumstances existing at the time of the passage." *United States* v. *Wise,* 370 U.S. 405, 411 (1962).[28] Applying this canon to this case, it is clear that neither the Congress nor the States intended that Title XIX require the States to fund abortion as a condition of participation in this program of "cooperative federalism."

In 1965 when Congress enacted the Title, only two States[29] and the District of Columbia[30] permitted abortion for anything which might conceivably be held to include maternal "health" or "medical necessity." Two States permitted abortion when pregnancy presented a grave threat

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[28] *Accord, Moor* v. *County of Alameda,* 411 U.S. 693, 709 (1973); *United States* v. *Rothberg,* 480 F.2d 534, 535 (2d Cir. 1971), *cert. denied,* 414 U.S. 856 (1973); *Ries* v. *Lynsky,* 452 F.2d 172, 175 (7th Cir. 1971); *Burns* v. *Alcala,* 420 U.S. 575, 580 (1975). *See also Roe* v. *Norton,* 522 F.2d 928, 935 (2nd Cir. 1975); *Roe* v. *Ferguson,* 515 F.2d 279, 293 (6th Cir. 1975); *Doe* v. *Rose,* 499 F.2d 1112, 1114 (10th Cir. 1974); *Beal* v. *Doe,* 432 U.S. 439, 447 (1977).

In *Beal,* the Supreme Court stated that its conclusion, based on the plain language of Title XIX, was "reinforced" by the illegality of abortion at the time of the adoption of Title XIX. *Beal* v. *Doe,* 432 U.S. at 447.

[29] Alabama and Oregon. Ala. Code tit. 46-270 (Supp. 1963); Ore. Rev. Stat. §163.060 (1964). *See* George *Current Abortion Laws: Proposals and Movements for Reform,* 17 West. Reserve L. Rev. 45, n. 44 (Dec. 1965). Massachusetts permitted "health" abortion by judicial decision in *Commonwealth* v. *Brunell,* 341 Mass. 675, 677, 171 N.E.2d 850, 852 (1961), though not as *Bolton* defined the term.

[30] D.C. Code Ann. §22-201 (1961) ("necessary for the preservation of the mother's life or health"). See *Current Abortion Laws, supra,* at 376, 376 n.32.

to life or health.[31] In 1965, 46 of the 50 States by statute proscribed abortion altogether or permitted it only to preserve maternal or fetal life; 47 of the 50 States restricted abortion more narrowly than "health" indications would permit.[32]

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[31] Colorado and New Mexico. Colo. Rev. Stat. Ann. §40-2-23 (1964); N.M. Stat. Ann. §40A-5-1, -3 (1964). *See Current Abortion Laws, supra* n.8, at 378, 378 n.44.

[32] States providing no statutory exception: La. Rev. Stat. §14:87 (Supp. 1964); Mass. Gen. Laws Ann. ch. 272, §19 (1956); N.J. Rev. Stat. §2A:87-1 (1953); Pa. Stat. Ann. tit. 18, §4718 (1963).

States providing an exception to preserve maternal life: Alaska Stat. §11.15.060 (1962); Ariz. Rev. Stat. Ann. §13-211 (1956); Ark. Stat. Ann. §41-301 (1964); Cal. Pen. Code §274; Del. Code Ann. tit. 11 §301 (1953); Fla. Stat. Ann. §§782.10, 797.01 (1965); Ga. Code Ann. §§26-1101, -1103 (1953); Hawaii Rev. Laws §§309-3, -4 (1955); Idaho Code Ann. §18-601 (1948); Ill. Ann. Stat. ch. 38, §23-1 (Smith-Hurd 1964); Ind. Ann. Stat. §10-105 (1956); Iowa Code Ann. §701.1 (1950); Kan. Gen. Stat. Ann. §31-410 (Supp. 1963); Ky. Rev. Stat. §436.020 (1959); Me. Rev. Stat. Ann. ch. 17, §51 (1965); Md. Ann. Code art. 27, §3 (1957); Mich. Stat. Ann. §28.204 (1962); Miss. Code Ann. §2223 (1957); Mont. Rev. Codes Ann. §94-401 (1949); Neb. Rev. Stat. §§28-404, -405 (1965); N.H. Rev. Stat. Ann. §585:13 (1955); N.C. Gen. Stat. §14-44 (1953); N.D. Cent. Code §12-25-01 (1943); Ohio Rev. Stat. §2901.16; Okla. Stat. Ann. tit. 21, §861 (Supp. 1964); R.I. Gen. Laws Ann. §11-3-1 (1957); S.D. Code §13.3101 (1939); Tenn. Code Ann. §39-301 (1955); Tex. Pen. Code Ann. art. 1191 (1961); Utah Code Ann. §76.2-1 (1953); Vt. Stat. Ann. tit. 13 §101 (1959); Va. Code Ann. §18.1-62 (1960); W.Va. Code Ann. §5923 (1961); Wis. Stat. Ann. §940.04 (1958); Wyo. Stat. Ann. §6-77 (1959).

States providing preservation of maternal life and unborn child's life exception. Conn. Gen. Stat. Ann. §53-29 (1960); Minn. Stat. Ann. §617.18 (1964); Mo. Ann. Stat. §599.100 (1953); Nev. Rev. Stat. §201.120 (1963); S.C. Code Ann. §16-82 (1962); Wash. Rev. Code §9.02.010 (1956).

See Current Abortion Laws, supra, n.8 at 375-379, nn.21, 22, 23, 24, 31, 43, 44, 45.

Abortion is nowhere mentioned in the Social Security Act. No legislative history exists which would indicate Congress ever intended the Act to mandate abortion funding in any respect, much less because it might be deemed "medically necessary." The congressional failure to enact a version of the Hyde Amendment before 1976, like the congressional failure to exclude coverage of abortion in the 1972 amendments to Title XIX treated in *Beal* (432 U.S. at 446 n.10), "indicate only that Congress intended to allow such coverage, not that such coverage is mandatory. . . ." Hence, the only way that such intent can be imputed to Congress is to hold that Congress intended that the Social Security Act oblige the States to fund illegal procedures. This requires one not only to presume that Congress intended to induce the overwhelming majority of States to contravene their express public policies, but also that these States agreed to aid and abet criminal acts as a condition of their participation in the plan. Either hypothesis is plainly absurd.

Almost unanimous proscription of "health" abortion at the time Title XIX was enacted thus creates a nearly conclusive presumption that mandatory funding of "health" abortion was not and is not within the intent of the Framers of the Title.

In *Beal* v. *Doe*, 432 U.S. at 447 n.12, this Court noted that

> [a]t the time of our 1973 decision in *Roe*, some eight years after the enactment of Title XIX, at least 30 States had statutory prohibitions against nontherapeutic abortions.

Of the "30 States" the Court indicated proscribed "nontherapeutic abortion," 28 by statute proscribed abortion altogether or permitted it only to preserve maternal or un-

born life.[33] Eight years after Title XIX was passed the clear majority of States continued to proscribe abortion for "health."[34]

" 'A fundamental canon of statutory construction is that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.' *Burns* v. *Alcala,* 420 U.S. 575, 580-581 (1975)." *Perrin* v. *U.S.,* 48 U.S.L.W. 4009, 4011 (1980).

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[33] Twenty-four states by statute permitted abortion, if at all, only to preserve maternal life: Ariz. Rev. Stat. Ann. §13-211 (1956); Idaho Code §18-1505 (Supp. 1971); Ill. Rev. Stat., c. 38, §23-1 (1971); Ind. Code §35-1 (1971); Iowa Code 701.1 (1971); Ky. Rev. Stat. §436.020 (1962); La. Rev. Stat. §14:87 (Supp. 1972), §37:1285 (6) (1954); Mass. Gen. Laws Ann. c. 272, §19 (1970); Mich. Comp. Laws §750.14 (1948); Mont. Rev. Codes Ann. §94-401 (1969); Neb. Rev. Stat. §28-405 (1964); N.H. Rev. Stat. Ann. §585.13 (1955); N.J. Stat. Ann. §24:87-1 (1969) ("without lawful justification"); N.D. Cent. Code §12-25-02 (1960); Ohio Rev. Code Ann. §2901.16 (1953); Okla. Stat. Ann. tit. 21 §861 (1972-1973) Supp.); Pa. Stat. Ann. tit. 18, §4718 (1963); R.I. Gen. Laws Ann. §11-3-1 (1969); Tenn. Code Ann. §39-301 (1956); Utah Code Ann. §76-2-1 (1969); Vt. Stat. Ann. tit. 13 §101 (1958); Wis. Stat. §940.04 (1969); Wyo. Stat. Ann. §6-77 (1957).

Four states permitted abortion only to preserve unborn or maternal life: Conn. Gen. Stat. Rev. §53-29 (1968); Minn. Stat. §617-18 (1971); Mo. Rev. Stat. §559.100 (1969); Nev. Rev. Stat. §200.020 (1967).

See J.A. Knecht *Abortion: Contradictions and Problems,* 1972 U. of Ill. L. F. (No. 1) 179, 179 nn.25, 26 (1972).

[34] Of the remaining 19 states, 11 modeled their statutes upon the Model Penal Code in the manner of the Georgia statute, Ga. Code Ann. §26-1207 (1971), found unconstitutional in *Doe* v. *Bolton.* Knecht, *Abortion: Contradictions and Problems, supra,* n.13, at 180, 180 n.28. Thus, these States also preclude many classes of "health" abortions, if "health" is taken to mean "medically necessary" under the *Bolton* standard.

Webster's Third International Dictionary 1126 (3rd ed. 1976) gives the "ordinary meaning" of "therapeutic abortion":

> abortion induced when pregnancy constitutes a threat to the mother's life.

Of course, the Court's decision in *Roe* in 1973 did not alter the content, terms or intent of the Social Security Act.[35] In fact, if the claim made herein had been raised in 1972, it would have been dismissed as patently frivolous. Yet the intent of the enacting Congress does not change. It is historical fact.

The lower court in *Beal* suggested that there was some broad intent implicit in Title XIX that States must fund all newly available or newly legal medical practices and procedures. This view was rejected by this Court, though adopted by its dissenters:

> It is impossible to believe that in enacting Title XIX Congress intended to freeze the medical services available to recipients at those which were legal in 1965. Congress surely intended Medicaid to pay for drugs not legally marketable under the FDA's regulations in 1965 which are subsequently found to be marketable. We can see no reason why the same analysis should not apply to the Supreme Court's legalization of elective abortion in 1973.

Beal v. *Doe,* 432 U.S. at 453, (Brennan, J. dissenting, quoting *Doe* v. *Beal,* 523 F.2d 611, 622-623 [3rd Cir. 1975]).

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[35] In its recent decision in *National Labor Relations Board* v. *Yeshiva University,* 48 U.S.L.W. 4175, 4177 (1980), this Court cited, as grounds for overturning an administrative agency interpretation, a contemporaneous but mistaken view of congressional constitutional authority which was held by the Congress at the time of passage of the act being construed.

There is an important distinction between abortion and a new drug not yet approved by the FDA (and hence not legally marketable at the time of the adoption of the Medicaid Title) which subsequently becomes legally marketable. Drugs as yet unapproved by the FDA are banned pending an investigation of their safety. The law does not ban particular drugs as such, but rather that class of drugs not yet shown to be safe. By contrast, abortion was banned because of the generally shared intention to protect fetal life. Abortion is not a new procedure which was not specifically within the contemplation of the legislature at the time medicaid was enacted. It is not a procedure for which treatment can be guided by general principles conceived to emanate from the Act. On the contrary, abortion was as well known then as it is now, as the laws in so many of the States prohibiting it attest.

Nor does the subsequent legalization alter the congressional intent not to force the States to fund abortion. Suppose that a State chose to decriminalize marijuana for a variety of social policy reasons, such as the widespread flouting of existing law or diversion of police resources, yet still sought to discourage its use. Suppose, then, that the State amended its state medicaid plan to provide that it would cover the use of marijuana for glaucoma—where the State was satisfied it had a demonstrated medical use—but in no other instances. If an individual physician felt that marijuana would relax his nervous patients or cheer up his depressed ones and was therefore "medically necessary" under the *Bolton* standard, it could not be seriously contended that the state exclusions would be subject to successful challenge solely on such grounds. The same contention must be rejected here.

The unconstitutionality of the laws in force against abortion at the time of the passage of the Medicaid Title does not alter this analysis. Neither *Roe* nor any subsequent

case of this Court has found the interest in fetal life, which was the basis for the anti-abortion laws,[36] to be illegitimate or unconstitutional *in itself*. Rather, this Court has simply held that this interest is not compelling enough to override the constitutional privacy right of women to abort by criminally prohibiting it or placing an "undue burden" on it. The interest is sufficiently strong and legitimate to justify distinctions in funding such as those here at stake.

"Related statutes may sometimes shed light upon a previous enactment." *Andrus* v. *Allard*, 100 S.Ct. 318, 325 (1979). Indeed, it is a basic canon of statutory construction that acts *in pari materia* should be read together. *Kokoszka* v. *Belford*, 417 U.S. 642 (1974), *reh. den.* 419 U.S. 886 (1975).

Whenever Congress has had occasion to address the issue of abortion, it has repeatedly expressed its disfavor of the procedure. The lower court itself noted, "The national policy, to the extent formulated . . . excludes use of abortion as a family planning method, 42 U.S.C. §300a-6. . . . The legislative history demonstrates conscious rejection by the Congress of any provision for therapeutic abortion as a procedure to deal with the array of the principal maternal and fetal health considerations presented during the debates." Slip op. at 293-294.

Pregnancy disability legislation specifically exempted abortions from coverage for medical benefit and disability pay unless an abortion was necessary to save the life of the mother. Civil Rights Act of 1964—Pregnancy Discrimination, Pub. L. No. 95-555, §1(k) (1978) (to be codified in 42 U.S.C. §2000e). Legislation perpetuating the Legal Services Corporation included provisions which restricted the

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[36] Gorby, *The Right to An Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement*, 1979 S. Ill. U. L. J. 1, 15-19, esp. 15 n.82, 16 n.83.

actions of corporation attorneys in abortion cases. Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, §10(b)(1) (to be codified in 42 U.S.C. §2996f). Congress has also repeatedly restricted funds available for abortions. Groups affected by these restrictions include military personnel and their dependents (Department of Defense Appropriation Act, 1979, Pub. L. No. 95-457, §863), medicaid recipients (Department of Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, §210),[37] and residents of the District of Columbia (District of Columbia Appropriations Act, 1979, Pub. L. No. 96-93). The use of Peace Corps funds for abortions has also been prohibited. Foreign Assistance and Related Programs Appropriations Act, 1979, Pub. L. No. 95-481. Such repeated action by Congress clearly demonstrate consistent legislative intent and public policy.

In light of longstanding congressional policy, it would do violence to the unequivocal legislative purpose if this Court were to hold that the Medicaid Title requires States to fund abortions.

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[37] In *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), this Court dealt with the relation between the Endangered Species Act and subsequent appropriations. The Court noted, "One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act." *Id.* at 173. By contrast, the appropriations which were seen as inconsistent with §7 were clear expressions not of the full Congress, but only of the Appropriations Committees. *Id.* at 193. Here, however, the Hyde Amendments are very plain, and assuredly well-known by the entire Congress. The underlying statute, by contrast, is silent with respect to abortion. Here, the less definite provision was later clarified by Congress. Such a subsequent pronouncement by an entire legislature can properly be accorded "great" or "significant" weight by a court charged with interpreting the earlier statute. *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380-381 (1969); *United States* v. *Stafoff*, 260 U.S. 477, 480 (1923).

Therefore, the district court's holding that Title XIX standing alone requires the States to fund all "medically necessary" abortions is erroneous. It must be reversed.

CONCLUSION

The judgment and opinion of the district court, insofar as they declared the Hyde Amendment unconstitutional, declared that the Medicaid Title would require funding of abortions, and ordered the Secretary of Health, Education, and Welfare to authorize the expenditure of federal matching funds for "medically necessary abortions," must be reversed.

Respectfully submitted,

JAMES L. BUCKLEY
JESSE A. HELMS
HENRY J. HYDE
ISABELLA M. PERNICONE
Intervening Defendants-Appellants
By:
DENNIS J. HORAN
VICTOR G. ROSENBLUM
JOHN D. GORBY
CARL ANDERSON
PATRICK A. TRUEMAN
THOMAS J. MARZEN
American United for Life
Legal Defense Fund
230 N. Michigan Ave. #515
Chicago, IL 60601
312/263-5386

GERALD E. BODELL
150 E. 35th St.
New York, NY

A. LAWRENCE WASHBURN, JR.
1414 Avenue of the Americas
New York, NY 10019

March 18, 1980.